79-421

Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-.....

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation, Defendant-Appellee,

John M. Bryant et al.,
Defendants-Appellees,

State of California, Defendant-Appellee,

Ben Yellen et al., Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS* et al.,
Defendants-Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS* et al.,
Defendants-Appellants,

W. L. Jacobs et al.,
Defendants-Appellants.

Nos. 71-2124, 73-1333, 73-1388.

United States Court of Appeals,
Ninth Circuit.

Aug. 18, 1977.

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* Walter J. Hickel, as Secretary of the Interior, was the originally named defendant. We substitute the name of his present successor in office. F.R.App.P. 43(c).

Appeals from the United States District Court for the Southern District of California.

Before BROWNING and KOELSCH, Circuit Judges, and WOLLENBERG,** District Judge.

WOLLENBERG, District Judge:

The Imperial Valley in southern California is a highly productive agricultural area. This is due to an extensive irrigation system which distributes water obtained from the Colorado River, for without this irrigation water the Imperial Valley would be an unproductive desert. At issue in these cases is whether certain restrictions in the reclamation laws limit the delivery of irrigation water to resident landowners and whether water deliveries are limited to only 160 acres of the property held by each private landowner.

I. Historical Overview.

Because it is almost entirely below sea level, it was recognized as early as the middle of the nineteenth century that irrigation of the Imperial Valley with water diverted from the Colorado River was possible by gravity flow. A private corporation organized in 1896 as the California Development Corporation made the initial appropriations and diversions of Colorado River water. The water was taken from the River just north of the boundary between Mexico and the United States. However, in order to avoid high mesa and sandhill country north of the international boundary that separated the Colorado River from the Imperial Valley, the water was carried by canal for approximately 50 miles through Mexico. After the canal reentered the United States, the water was distributed to land in the Imperial Valley through a system of irrigation canals owned by seven mutual water companies. These water companies had been organized by the California

**The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.

Development Company and were later acquired by the individual landowners whose land received the water.

In 1905, the Colorado River broke through its banks with disastrous results. The River changed its course and for many months flowed through the washed-out intake of the California Development Company into the canal in Mexico and then into the Imperial Valley. The flood created the Salton Sea with a surface area of over 330,000 acres within the Imperial Valley and threatened to destroy the entire area. The California Development Company could not contain the River. Danger to the tracks of the Southern Pacific led that company to advance funds to the California Development Company to control the River, and the railroad took a controlling interest in the Development Company as security. The railroad eventually succeeded itself in closing the breach in the river bank and returned the River to its channel. In 1916, the railroad foreclosed on the Development Company's interests and then transferred those interests to the Imperial Irrigation District (hereinafter "District").[1]

At first, the District distributed water to the seven mutual water companies on a wholesale basis. By 1923, however, the District acquired all of the mutual water companies. Since then, it has been the only entity diverting, transporting, and supplying water from the Colorado River to agricultural lands in the Imperial Valley.

The interstate allocation of water from the Colorado River, control of flooding, regulation of water supplies on a predictable and useful basis, and the construction of a canal to the Imperial Valley that did not pass through Mexico were major concerns of not only Imperial Valley landowners but of the seven states in the Colorado Basin during the early years of the 1900s. Extensive efforts to resolve these problems led first to the agreement in 1922 between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming known as the Colorado River Compact and

1. The District, an agency of the State of California, was formed in 1911. See Cal.Water Code §§ 20500 *et seq.*

then to the passage in 1928 of the Boulder Canyon Project Act (hereinafter "Project Act"). 45 Stat. 1057, 43 U.S.C. §§617 *et seq.* The Project Act provided, *inter alia,* for ratification of the Colorado River Compact, the construction of Boulder (now, Hoover) Dam, and the construction of Imperial Dam where water was to be diverted to a canal running to the Imperial Valley. The canal was to run entirely through United States territory and hence received the name All-American Canal.

By the time the Project Act became effective in 1929, extensive private efforts had resulted in irrigation of almost 425,000 acres in the Imperial Valley. Since then, very little additional irrigated land has been added in the District. In 1932, the District entered into a contract with the United States providing for the construction of the Imperial Dam and the All-American Canal by the United States and repayment of certain costs by the District. Landowners in the Coachella Valley, north of the Imperial Valley, formed their own water district and eventually negotiated their own contract with the government for construction of facilities to deliver water to that Valley. Water delivery to the Imperial Valley through the All-American Canal began in 1940 and since 1942 the District's entire water supply has been carried through the All-American Canal. The District subsequently disposed of its interest in Mexico.

The 1932 contract with the District did not specifically provide for any acreage limitations on private lands receiving water through the massive projects being built by the United States. Due to the combination of a 1933 letter from the Secretary of the Interior to the District and the inaction of the Department of the Interior, no acreage limitations that were contained in the reclamation laws were enforced with respect to privately owned lands in the Imperial Valley. In 1964, the Solicitor of the Department of the Interior concluded that the previous Department interpretation of the law and administrative practice were incorrect and that the acreage limitations should apply to privately owned lands.

The Department of the Interior attempted to negotiate a new contract with the District that would incorporate acreage limitations but the negotiations failed. In 1967, therefore, the government filed an action for declaratory relief against the District. The complaint sought a declaratory judgment that the land limitation provisions of the reclamation law applied to privately owned lands in the District that received Colorado River water through the All-American Canal. The government specifically relied upon Section 46 of the Omnibus Adjustment Act of 1926, 44 Stats. 649, as amended, 43 U.S.C. § 423e (hereafter "Section 46"),[2] as the acreage limitation statute that applied.[3]

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2. In pertinent part, Section 46 provides that:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States . . . and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior. Because of California's community property laws, a husband and wife may own 320 acres and still be in compliance with the reclamation law. For the sake of consistency with the statutory language, the limitation referred to throughout this opinion will be 160 acres.

3. For a more detailed historical account, see *United States v. Imperial Irrigation District,* 322 F.Supp. 11, 12-15 (S.D.Cal. 1971). Additional historical data will be referred to in the course of this opinion.

In its suit, the government did not rely upon Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431. That statute contains an earlier version of acreage limitations on lands receiving water through federal reclamation projects. It also restricts the delivery of water through federal reclamation projects to lands owned by residents of the reclamation project area.[4] A group of Imperial Valley residents, dissatisfied with government nonenforcement of this statute in the Imperial Valley, brought suit in 1969 against the government to enforce the residency requirement of Section 5 of the Reclamation Act of 1902.

The government thus found itself in the position of claiming that, despite its previous inaction, one section of the reclamation law applied in the Imperial Valley while also defending its nonapplication of another section of the reclamation law which is in one respect similar to the statute it sought to apply. The cases were heard by two different judges and eventually the government's position was rejected in both cases. Before reaching the substantive matters raised in the appeals from these two decisions, we are obliged to consider procedural complications and questions of standing.

II. Standing.

A. *Yellen v. Andrus,* Nos. 73-1333, 73-1388.

This action (hereinafter "the residency case") was instituted by several individuals who resided within the boundaries of the Imperial Irrigation District but who owned no farm land in the District or anywhere else in the United States. They sought to compel the Secretary of the Interior and various officials of the Department of the Interior to enforce the residency requirements of Section 5 of the Reclamation Act of 1902, 43 U.S.C. § 431.[5] Their case was

4. The precise scope of this restriction was hotly contested in the proceedings below.

5. In referring to the sale of rights to the use of water delivered through federal reclamation projects to private landowners, 43 U.S.C. § 431 provides, in pertinent part, that "no such sale shall *(Footnote continued on next page.)*

brought in the form of a mandamus action under 28 U.S.C. § 1361.

In 1971, the district court granted partial summary judgment against the government, holding that 43 U.S.C. § 431 applies to private lands within the Imperial Irrigation District receiving water from the Boulder Canyon Project through the All-American Canal. *Yellen v. Hickel,* 335 F.Supp. 200 (S.D.Cal. 1971). Thereafter, various landowners in the Imperial Valley intervened and raised arguments not previously set forth by the government. A full trial on the merits was then held. The district court issued findings of fact and conclusions of law and again held for the plaintiffs. *Yellen v. Hickel,* 352 F.Supp. 1300 (S.D.Cal. 1972). Judgment in favor of the plaintiffs was entered and both the government and the intervening landowners appealed.[6]

The issue of plaintiffs' standing to bring this action was considered at various times in the district court proceedings and was resolved in favor of the plaintiffs. See 352 F.Supp. at 1303-1304. In light of more recent Supreme Court decisions, this Court has not adopted the test for standing used by the district court in this case. *Bowker v. Morton,* 541 F.2d 1347, 1349 n.3 (9th Cir. 1976). At this Court's invitation, the parties have submitted additional briefs on the standing question in light of the *Bowker* decision.[7]

be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Act of June 17, 1902, c. 1093 § 5, 32 Stat. 389. Section 5 also contains limitations on the size of tracts for which rights to the use of water may be sold and conditions the permanent attachment of such rights on full payment by the landowner. The complaint did not seek enforcement of these portions of Section 5.

6. The government's appeal is No. 73-1333, and the appeal of intervening landowners is No. 73-1388.

7. While the standing issue was raised below, at one time during the course of this appeal it may not have been pressed by the appellants. However, "since jurisdiction to decide the case is implicated," the issue must be considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In *Bowker v. Morton,* a group of small family farmers in one area of California sought to compel the government to apply the federal reclamation laws, particularly the residency requirement of 43 U.S.C. § 431 and the statutes concerning excess land holdings, to an irrigation project in another area of California. Although injunctive relief against other landowners was sought, the most the *Bowker* plaintiffs could have obtained was an order requiring the government to enforce the reclamation laws and discontinue supplying water to lands not in compliance with the law. That is essentially the relief sought by the plaintiffs in this case, and the standing test enunciated in *Bowker* applies in this case as well. Distilled from the recent cases of *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that test, "compactly put, . . . is that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. Application of that test to the facts of this case leads to the conclusion that the plaintiffs have no standing to maintain this action.

In their amended complaint,[8] the plaintiffs alleged that they resided within the boundaries of the Imperial Irrigation District and in the vicinity of privately owned lands which are irrigated by water supplied through the federal reclamation project. They alleged that the only source of irrigation water in the Imperial Valley is the federal project. Much of the irrigated farm land in the area was alleged to be owned by persons who were not bona fide residents on the land and who were not residing in the neighborhood of the land. None of the plaintiffs owned any farm land and they alleged a desire to own farm land in the area. Because of the scant rainfall and lack of any other irrigation source, the plaintiffs would have to purchase lands irrigated with

8. The record on this appeal does not include a copy of the amended complaint. However, the amended complaint does appear in the record of the companion appeal, No. 71-2124, in the Clerk's Transcript, Volume 1, at pages 206-211.

water from the federal reclamation project in order to fulfill their desire to own farmland. The essence of their case is that their ownership desires have been blocked because the government, by failing to enforce the residency provision of 43 U.S.C. § 431, permits irrigation water to be received by nonresident owners of farm land and that enforcement of the law will result in making farm land available for purchase at prices plaintiffs could afford. The district judge found that about half of the farms in the Imperial Irrigation District were owned by nonresidents and that enforcement of the residency requirement would bring "an immediate and substantial decline in the market value of farm land" in the District. He made no findings concerning the proportion of the farm acreage in the District owned by nonresidents or what his term "substantial decline" meant in terms of actual prices for farm acreage.[9]

In *Bowker,* the plaintiffs had not alleged that they desired to buy land in the area which they sought to bring under the provisions of the federal reclamation laws, and they did not state any prices which they could afford to pay should land be available for purchase. Consequently, their claim that failure to enforce the federal reclamation laws resulted in the unavailability of land for purchase at "reasonable" prices was held to fail to set out "a particularized injury resulting from the defendants' action." 541 F.2d at 1350. Here, plaintiffs do allege a desire to purchase farm land. However, there is nothing in the record to indicate what price any plaintiff could afford to pay for any particular farm or that enforcement of the residency requirement of 43 U.S.C. § 431 will lead to a decline in farm land prices sufficient to bring those prices into a range where plaintiffs could afford to purchase a particular farm.[10]

The relief sought by the plaintiffs in this case would not come through the government action they seek. The price

9. Findings of Fact XXIX, XXX. 352 F.Supp. at 1317.

10. Plaintiffs cannot assert injury in their status as taxpayers. *Bowker v. Morton, supra,* 541 F.2d at 1349 n.2. In addition, they cannot claim injury from any failure of the government to discharge its duty to the public. *Turner v. Kings River Conservation District,* 360 F.2d 184, 198 (9th Cir. 1966).

of land is determined by the relationship between the demand for and supply of land in the Imperial Valley. The land market would adjust to a new residency requirement but at levels that cannot be determined with any degree of precision and which may still be higher than plaintiffs can afford. It is indisputable that a wide variety of other government actions can also affect this land market. A change in tax regulations relating to agricultural land or a change in the crop support system for crops grown in the Imperial Valley could just as likely affect the price of agricultural land as an application of the residency requirement. In addition, plaintiffs' inability to afford farming land also stems from their insufficient income. A change in government regulations concerning loans for the purchase of agricultural lands or income support to agricultural workers could increase the plaintiffs' ability to purchase farming land without necessarily reducing the price of land. The injury plaintiffs allege — the inability to purchase farming land at prices they can afford — is neither particularized nor does it flow "concretely and demonstrably" from the government's activities, or lack of activity, challenged in the complaint.

Furthermore, any relief that could appropriately be ordered in this case would not redress plaintiffs' alleged injuries. The most that could be ordered is a discontinuance of deliveries of water to lands owned by nonresidents. Nonresident landowners could not be forced to sell their lands. Some lands owned by nonresidents might be turned to industrial or residential uses. Nonresidents could move back to the area and continue to receive irrigation water for their lands.[11] Land placed for sale by non-residents

11. The government has contended that residency is not a continuing requirement for the delivery of water. See, e. g., 43 C.F.R. § 230.65. In that case, those nonresidents who were residents when they first began to receive water might be able to continue to receive that water even if the residency requirement of Section 5 was enforced. This would add a further factor of uncertainty when considering whether plaintiffs' injuries would be redressed by the order they seek. However, the district court rejected this *(Footnote continued on next page.)*

could be purchased by residents other than the plaintiffs or by nonresidents who wished to move to the area in order to obtain farm land. These two groups of prospective purchasers would compete with plaintiffs for the purchase of available farm lands and drive up prices. Plaintiffs were not required to prove with absolute certainty that this aspect of the test for standing would be satisfied, but after a full trial we are still of the opinion that:

> [i]t is a mere speculative possibility that any relief which is appropriate under the statute will bring about the result sought by plaintiffs. . . . [T]he solution to plaintiffs' problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by plaintiffs.

Bowker v. Morton, supra, 541 F.2d at 1350.[12]

The conclusion that plaintiffs lack standing is not changed, as plaintiffs would suggest, by the decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d

interpretation of Section 5. Consequently, without expressing any opinion on the correct view of the problem, we do not consider the possibility that residents could continue to receive water for their lands even after they move out of the area when evaluating the standing problem.

12. This is not a case where remand to the district court for the purpose of making further relevant findings of fact would be appropriate. No individual plaintiff testified at the trial, and there is no other evidence which would support any findings on the desires of any individual plaintiff to purchase any particular farm. In addition, the testimony of the agricultural economist that forms the basis for the district court's finding that enforcement of the residency requirement would bring an "immediate and substantial" decline in land prices cannot support any findings more definite than the one the district court has already made. In fact, that testimony sets forth so many variables that must be considered in conjunction with a theoretical enforcement of the residency requirement that it supports, rather than detracts from, the conclusion that plaintiffs' injuries would not be redressed by the relief requested in this lawsuit. See Reporter's Transcript, pps. 254-277.

450 (1977). The individual plaintiff in that case alleged more than a desire to live in a certain municipality. Instead, he sought to live in a particular proposed housing development, and he would have qualified to live there had the development been built. The builder of the proposed project was a co-plaintiff, and the challenged action of the municipal government was a direct roadblock to the fulfillment of the desires of both plaintiffs. There was no generalized grievance where redress depended on speculation about the activities of third persons not parties in the lawsuit. 429 U.S. at 260-264, 97 S.Ct. 555. The plaintiffs herein, on the other hand, are like the individual plaintiffs who were found to lack standing in *Wrath v. Seldin, supra,* 422 U.S. at 502-508, 95 S.Ct. 2197.[13]

B. *United States v. Imperial Irrigation District,* No. 71-2124.

This appeal (hereinafter the "acreage case") comes to us in a different procedural posture from the residency case. Here, the complaint was filed by the government. It sought a declaration that the excess land provisions of the reclamation laws, particularly Section 46 of the Omnibus Adjustment Act of 1926, applied to privately owned lands in the Imperial Irrigation District that received irrigation water through the All-American Canal. There was no question of the government's standing. This case was not heard by the same judge who made the decisions in the residency case. In an opinion reported at 322 F.Supp. 11 (S.D.Cal. 1971), the district court ruled against the government. Judgment was entered, and the government decided not to appeal.

13. There is a second, nonconstitutional standing requirement that the interests of the plaintiffs be "arguably within the zone of interests to be protected or regulated" by the statute which plaintiffs seek to enforce. *Data Processing Serv. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1969), cited in *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 39 n.19, 96 S.Ct. 1917, 48 L.Ed.2d 450. Determination of this question would also be relevant to the determination of whether the government has a "duty" to plaintiffs which can be enforced by an action in the nature of mandamus under 28 U.S.C. § 1361. In view of our disposition of this case, there is no need to consider these questions as they arise in the context of this case.

After judgment had been entered and before the time for filing a notice of appeal had run out, a group substantially identical to the plaintiffs in the residency case filed a protective notice of appeal and sought leave to intervene.[14] The district court denied permission to intervene. On appeal, another panel of this Court reversed the district court's order denying permission to intervene, allowed intervention, and validated the protective notice of appeal. That panel further ordered that the appeal in this case be consolidated with the appeals in the residency case.

The unpublished order allowing intervention is attached as an appendix to this opinion. The order emphasized the two conflicting decisions from the district court concerning applicability of the reclamation laws and the responsibility of the court to resolve this problem if such a resolution were "feasible". Of course, that the panel did not have the residency appeal before it and could not anticipate our decision on standing in light of cases, such as *Bowker v. Morton, supra,* which had not been decided when intervention was allowed. Since the district court decision in the residency case must be vacated because of lack of standing on the part of the plaintiffs therein, the basis for the order allowing intervention in the acreage case has disappeared.[15]

14. This group had previously been given permission to appear below as *amicus curiae.*

15. The order allowing intervention also appears to be based on a misunderstanding as to the identity of the various intervenors. The district court allowed various interested Imperial Valley landowners to intervene as defendants early in the proceedings. This Court's earlier order allowing intervention refers to the "interested Imperial Valley landowners" as the group seeking to perfect and prosecute the appeal. In fact, this group had obtained a favorable decision from the district court and opposed the prosecution of an appeal by parties other than the government. It was the Yellen group, a group of non-landowners, who had filed the protective notice of appeal and who sought to prosecute the appeal, and whose intervention request had been denied by the district court.

The Yellen intervenors urge that the order allowing intervention cannot be re-examined because of the "law of the case" doctrine. That doctrine, however, is not to be applied woodenly. An appellate court has the power to reconsider issues that have been previously decided and will do so if such a course is warranted by "considerations of substantial justice." *Lehrman v. Gulf Oil Corporation,* 500 F.2d 659, 662-663 (5th Cir. 1974), *cert. denied,* 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975). This case does not involve a previous remand to the district court or "panel shopping" by any of the parties. It involves an unpublished interlocutory order allowing an appeal to go forward where the basis of the order has been eliminated by subsequent events.[16] It would be ironic to allow the Yellen intervenors to use an erroneous district court ruling on standing in another case to bootstrap themselves into a position of litigating the important question of the enforcement of the federal reclamation laws in this case. Under these circumstances, it is appropriate to once again examine the request for intervention.

A party seeking to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, need not possess the standing necessary to initiate the lawsuit. *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). Nevertheless, a party possessing the standing to intervene does not automatically have the ability to appeal a decision which all other parties have decided not to appeal. In order to be able to appeal, the intervenor must have an "appealable interest." Shapiro, *Some Thoughts*

16. Under Ninth Circuit Rule 21, the unpublished order allowing intervention is not regarded as precedent but is relevant to the law of the case. Whether it should stand as the law of the case is the very question we determine. The order itself required the appeal to be heard by this panel in conjunction with the appeal in the residency case and thus necessarily contemplated that this panel would dispose of both cases in the appropriate manner. Such a disposition includes a determination of the proper law of the case. Under these circumstances, there is no requirement that reconsideration of the order allowing intervention be done *en banc.* Cf. *Chabot v. National Securities and Research Corporation,* 290 F.2d 657, 659 (2dCir. 1961).

on Intervention Before Courts, Agencies and Arbitrators, 81 Harvard Law Rev. 721, 753-754 (1968). Resolution of this question turns on traditional standing analysis. *Norman's on the Waterfront, Inc. v. Wheatley,* 444 F.2d 1011, 1013-1014 (3rd Cir. 1971). Mere interest in the establishment of a legal precedent is not sufficient. *Boston Tow Boat Co. v. United States,* 321 U.S. 632, 64 S.Ct. 776, 88 L.Ed. 975 (1944). With these considerations in mind, we turn to the question of whether the Yellen group had an interest in this litigation that would permit them to intervene for the purpose of taking an appeal from the judgment of the district court.

In support of their motion for permission to intervene, the Yellen group asserted that they resided within the boundaries of the Imperial Irrigation District, that most of them were farm workers, that none owned farm land anywhere in the United States, and that they desired to purchase "excess lands" irrigated with water delivered by the federal reclamation project. These excess lands would be the private lands that would have been sold under the provisions of Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e, had the government prevailed in the litigation. They further alleged that they were within the class of beneficiaries of the reclamation laws that were the focus of the lawsuit.[17] Read, as it must be, in the light of the government's complaint, their interest is in the purchase of farm lands at prices to be set in accord with the dictates of Section 46.

This Court has only recently extensively reviewed the purposes behind Section 46. That Section was adopted to achieve broad antimonopoly and antispeculation purposes "conceived by Congress to be of importance to society as a whole." *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1121 (9th Cir. 1976), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571. We specifically noted also that

17. They also alleged an interest because of their prosecution of the residency case. In light of our disposition in that action, we do not consider whether this is an interest that would support intervention.

"Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale." *Id.* The history of the reclamation laws confirms that one of their primary purposes was the establishment of a large number of family-size farms. *Id.* at 1119, 1122. See generally, Taylor, *The Excess Land Laws: Execution of a Public Policy,* 64 Yale L.J. 477, 481-489 (1961). In this case, the district court found that there were approximately 800 owners of irrigable land in the Imperial Irrigation District whose holdings totalled over 160 acres and that the aggregate landholdings of this group were approximately 233,000 acres.[18] Sale of any of these holdings in excess of 160 acres in accord with Section 46 would make family-size farms available for purchase in the Imperial Valley at prices below current market prices.[19]

The injury that the Yellen group is asserting in this case is not merely the high cost of land. More precisely, they assert that in order to buy irrigable farm land in the Imperial Valley they must pay prices higher than they would have to pay if Section 46 applied to the private landowners in the area. The Yellen group suffers from this injury no matter which parcel of land is desired for purchase. The fact that it cannot be specifically measured in dollar amounts at this time does not change the fact that, under the formula established in *United States v. Tulare Lake Canal Co., supra,* the sale price of parcels of irrigable farm land in the Imperial Valley will definitely be reduced if Section 46 were to be applied as the United States originally contended when this action was filed.

This injury stems directly from the lack of recordable contracts required by Section 46. In the absence of a requirement that landowners execute such a contract in order to receive irrigation water, it is inconceivable that any

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18. *United States v. Imperial Irrigation District, supra,* 322 F.Supp. at 12.

19. For a description of the method for determining the sale price, see *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 1113 n. 74, 1144.

landowner would sell any land at prices substantially below current market prices.

Furthermore, this injury would be redressed by a court order declaring the applicability of Section 46. There would be no need to bring additional parties before the district court before such an order could be issued. Once there was such a court order, redress of the injury would not depend upon the uncertain responses of the large landowners or the land market. While not all landholders might execute the contracts required by Section 46, the vast majority of the land in use in the Imperial Valley Irrigation District is engaged in agricultural production and it would be highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46. Once the appraisal process was completed, formerly large agricultural landholdings would be available in small parcels at prices below the current market price.

It is important to emphasize the difference between the interest and injury involved in this case and the situations in the residency case and the *Bowker* case where the plaintiffs were found to lack standing. In the residency case, the plaintiffs sought a court order that would not, except in a very speculative sense, lead to the availability of farm land at an undefinable price which the plaintiffs could allegedly afford. In contrast, the interest asserted here is much more limited. It is an interest only in reducing land prices, not an interest in reducing land prices to any specific level, and unlike the residency case it is an interest that can be satisfied by an appropriate court order and without the need to depend on the uncertain actions of non-parties to the action and the uncertain responses of the market for agricultural land. In the *Bowker* case, the plaintiffs sought only to force landowners in another area to sell their land at prices determined by the application of Section 46. They did not desire to purchase this land, even if the price were to be reduced, and those plaintiffs were therefore not injured by higher land prices. In contrast, the group attempting to intervene and prosecute the appeal herein desires to take

advantage of a certain reduction in land prices and purchase land at those reduced prices.

In its order denying the Yellen group leave to intervene, the district court noted that the potential intervenors had not demonstrated a present ability to purchase the lands they desired. The district court also noted that the requirement for recordable contracts was not inconsistent with the usual right of a seller to choose his purchaser and that there would quite likely be a large group of people with veteran's preferences for the purchase of excess lands that would have a better chance than the Yellen group to purchase excess land created by the enforcement of Section 46.[20] However, the standing test of Article III does not require that the Yellen group show with certainty that they will be able to purchase the excess lands should they prevail on the merits of this appeal. The Yellen group occupies a position similar to that of the developer in *Village of Arlington Heights v. Metropolitan Housing Development Corporation, supra.* The relief sought by the developer would not guarantee that its project would be built, for further problems with financing or construction, unrelated to the subject of the lawsuit, might interfere with its building plans. Such speculation, however, could not diminish from the fact that the relief sought was necessary if construction were to take place and that the developer had the requisite stake in the lawsuit. 45 U.S.L.W. at 4076. Similarly, in this case the likelihood that other factors may interfere with the intervenors' desires to purchase land cannot change the fact that land will never be available at below current market prices unless Section 46 is held to be applicable and that the intervenors thus have the necessary stake in the outcome of the lawsuit to confer standing to prosecute this appeal.[21]

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20. We express no opinion on the validity of these propositions.

21. See also *National Association of Neighborhood Health Centers, Inc. v. Mathews,* 179 U.S. App.D.C. 135, 551 F.2d 321 (D.C.Cir. 1976). There, an organization of community mental health centers sought to appeal a district court order concerning the transfer of federal funds by certain states from outpatient aid programs to hospital aid programs. Return of the funds to the outpatient aid program would not have meant that the plaintiff organization's members in those states would then have received the funding grants under the outpatient aid program. However, return of the funds would have benefited these members because it would create a larger pool of funds available for outpatient programs. This enhancement of the prospect of funding was held to be "substantial relief" sufficient to establish standing to challenge the district court's order concerning the transfer of funds. *Id.* at 329. Similarly, in this case, the intervenors' opportunity to obtain significantly lower land prices would be substantially enhanced by an appropriate court order. In the residency case, however, our previous discussion has pointed out that there is no substantial certainty that the opportunity of the plaintiffs therein for obtaining the relief sought in that case would be enhanced by an appropriate court order.

Finally, it must be determined whether the Yellen group has an interest sufficiently within the "zone of interests" protected by Section 46 which is different from the interest of a taxpayer or member of the general public and which satisfies the non-constitutional test for standing of *Data Processing Serv. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1969).[22] From our previous summary of the purposes behind Section 46, derived from *United States v. Tulare Lake Canal Co., supra,* it would appear that a non-landowning resident of an area where agriculture is feasible only because of a federal irrigation project who desires to purchase agricultural land and become a farmer is a particular "beneficiary" of Section 46 distinct from the general public and falls within the statute's "zone of interests."

The Yellen group thus has an interest under Rule 24(a)(2) which it may pursue on appeal.[23] Accordingly, we

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22. See footnotes 9 and 12, *supra.*

23. The district court discussed other reasons for denying intervention. First, it held that a previous proceeding in the California courts precluded the applicants for intervention from further litigating the acreage limitation question. We consider this problem in Section III, *infra.* The district court also decided that the Yellen group's interest was too speculative and remote to support intervention, because its decision on the merits would first have

reaffirm the previous order granting intervention and validating the protective notice of appeal, and we proceed to consider the merits of the case.

III. Res Judicata.

After the United States and the Imperial Irrigation District entered into the contract for the repayment of construction costs for the All-American Canal, the District initiated a confirmation action in the Superior Court of California for Imperial County. This action, entitled *Hewes v. All Persons,* resulted in a 1933 judgment that the landowners[24] claim is *res judicata* as to the contention that acreage limitations apply to privately owned lands in the Imperial Irrigation District.

In 1933, California law allowed an irrigation district to submit a contract for cooperation with the United States to a superior court for a validation proceeding.[25] Pursuant

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to be reversed on appeal. However, that was the very result that the Yellen group sought. The district court also felt that the necessity for further proceedings to determine the value of lands to be disposed and a plan for disposition made the possibility of relief even more remote. The length of time, however, before lands become available does not diminish the interest of the applicants for intervention. Finally, the district court noted that the United States had vigorously represented the interests of the Yellen group throughout the litigation. However, the decision of the government not to appeal meant that those interests were no longer being adequately represented.

24. Appellees in this case are the Imperial Irrigation District, named as a defendant below, landowners in the District owning more than 160 acres of irrigable land (appearing on behalf of themselves and the class of landowners owning excess lands) who were allowed to intervene by the district court, and the State of California which was also allowed to intervene below. Not all of the appellees have raised the same arguments in support of the judgment but none have taken positions that contradict the arguments of another appellee. The briefs of the landowner intervenors are the most comprehensive. Consequently, for the sake of convenience, all the appellees will be referred to throughout the remainder of this opinion as landowners.

25. 1897 Cal.Stat. c. 189, p. 276 § 68; 1917 Cal.Stat. c. 160, p. 243 § 3. See Cal.Water Code §§ 22670-22671, 23225.

to Article 31 of its contract with the United States, the District was required to institute a judicial confirmation proceeding, and the *Hewes* action was designed to satisfy that requirement.[26] The validity of the contract was challenged on grounds not relevant here by landowners in the Coachella Valley. At the same time, a landowner in the Imperial Valley named Charles Malan instituted another action entitled *Malan v. Imperial Irrigation District.* The *Malan* action raised a number of objections to the contract. One of those objections was that Malan, as an owner of more than 160 acres, would be deprived of delivery of water for his excess lands by the reclamation law if the contract was confirmed. The District took the position that this objection was meritless as the acreage limitation provisions did not apply under the terms of the Project Act. The District even went so far as to solicit a letter from the Secretary of the Interior to support their position in the *Malan* litigation.[27]

The *Malan* case was considered along with the *Hewes* confirmation proceeding. The superior court found that the contract would not limit the delivery of water to excess lands, concluded that no acreage limitations were made applicable to private lands by the contract and specifically stated that Section 5 of the Reclamation Act of 1902 did not apply in the Imperial Valley.[28] The judgment of the superior court became final in 1934 when appeals from that

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26. No such requirement was contained in the Project Act. The parties dispute whether the requirement was placed in the contract because of provisions for a confirmation proceeding in Section 46, Section 1 of the Act of May 15, 1922, 43 U.S.C. § 511, or merely because of California law. We deem it unnecessary to decide the source of authority for the contract provision for a judicial confirmation proceeding. The relevant issue is the *res judicata* effect to be given a judgment actually rendered by a California court in a confirmation proceeding.

27. See part VI of this opinion.

28. Although partially denominated a finding of fact, it is clear that all of the essentials of the decision on the acreage limitation issue were legal conclusions.

judgment to the California Supreme Court were dismissed by the parties.[29]

The United States was not a party in the *Hewes* and *Malan* actions, and the landowners did not raise a *res judicata* defense against the United States in the district court proceedings in the present case. The intervenors claim that such a defense cannot be raised against the United States and therefore cannot be raised against them because they are only asserting claims originally raised by the government. However, as discussed previously, the interests of an intervenor appealing a judgment are not necessarily identical with the interests of a non-appealing party which originally instituted the action. The intervenors' interests in this case are their own private interests and not the public interests represented by the government. Accordingly, we must determine whether the intervenors are barred by *res judicata* from litigating the acreage limitation question.

Under California law, a confirmation proceeding involving an irrigation district contract with the United States is considered an *in rem* proceeding. It is brought against all persons claiming an interest in the formation of the irrigation district, the operation of the contract, and the lands affected by the contract. A final judgment in a confirmation proceeding "will foreclose further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it will be binding on the world at large." *Ivanhoe Irrigation District v. All Parties & Persons,* 47 Cal.2d 597, 606, 306 P.2d 824, 829 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken,*

29. While the appeal was pending, the Bureau of Reclamation sent a letter to the Coachella Valley water district to the effect that unless it dismissed its appeal, the Bureau would make plans for the All-American Canal that would not include a capacity to deliver water to the Coachella Valley. While the reasons for the dismissal of the Coachella appeal are not in the record, it should be noted that shortly thereafter the Coachella appeal was in fact dismissed and a separate contract for the Coachella Valley was negotiated with the United States. The record also includes a letter from Malan's attorney complaining about pressure to drop the appeal, but the record does not contain anything to explain why Malan's appeal was dismissed.

357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958). Phrased another way, "[w]ithin its legitimate issues it will be binding on the world at large." *Santa Barbara County Water Agency v. All Persons & Parties,* 47 Cal.2d 699, 703, 306 P.3d 875, 873 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra.*

It therefore becomes necessary to determine what the "pertinent" or "legitimate" issues are in a confirmation proceeding, because the California courts will recognize the confirmation proceeding judgment as *res judicata* only as to those issues to which the judgment "properly relates". This question was answered in the *Ivanhoe* proceedings in opinions of the California Supreme Court both before and after the Supreme Court decision on other aspects of the case. "The judgment [in a confirmation proceeding] is limited to a determination of the validity of the contract." *Ivanhoe Irrigation District v. All Parties and Persons, supra,* 47 Cal.2d at 607, 306 P.2d at 829, such a judgment determines questions necessarily incident to such a determination. *Id.* However, "the only issue involved is the validity of the contract." *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 699, 3 Cal.P.ptr. 317, 320, 350 P.2d 69, 72 (1960) (Emphasis supplied.)

For purposes of this case, therefore, we start with the proposition that the *Hewes* judgment establishes the validity of the contract. That portion of the *Hewes* decision dealing with the acreage limitations of the reclamation law, however, is not essential to a determination that the contract was valid. A decision that the Project Act incorporates the acreage limitations on private lands of the reclamation law into the contract would not make the contract invalid under federal law, *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958), or California law. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).[30] A decision that the Project Act does not in-

30. While this case interpreted Cal. Water Code §§ 23197, 23200, which were enacted in 1943, those statutes are essentially the same as earlier California statutes to the same effect that were applicable when the Imperial Irrigation District contract was made. See 1917 Cal.Stat. c. 160, pps. 244, 245, §§ 2, 4.

corporate the acreage limitations is a decision that Congress exempted the project from application of those limitations and would not make the contract invalid under federal or California law. The decision that acreage limitations did not apply under the contract was therefore irrelevant to the only question properly before the court in the confirmation proceeding — the validity of the contract — and it is pure dicta. Cf. *Stanson v. Mott*, 17 Cal.3d 206, 212, 130 Cal.Rptr. 697, 701, 551 P.2d 1 (1976).

The federal courts are bound to give the *Hewes* judgment the "same full faith and credit" it would be given by the courts of California. *Neale v. Goldberg*, 525 F.2d 332 (9th Cir. 1975). The determination of the *Hewes* court that acreage limitations did not apply in the Imperial Irrigation District was not a determination which is "properly related" to the purpose of the confirmation proceeding because decison of that issue one way or another cannot affect the validity of the contract under federal or California law. The determination of the acreage limitation issue by the *Hewes* court was an interpretation of the terms of the contract that the court was not entitled to make in a confirmation proceeding. Cf. *Ivanhoe Irrigation District v. All Parties and Persons, supra*, 53 Cal.2d at 727-728, 3 Cal.Rptr. at 338, 350 P.2d at 90. While the acreage limitation was litigated in the confirmation proceeding, that issue was incidental and collateral to the judgment rendered therein. The judgment in the confirmation proceeding cannot foreclose consideration of the acreage limitation issue in the present case. *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1898 (9th Cir. 1977).[31]

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31. We therefore need not determine whether intervenors were interested parties in the *Hewes* litigation such that they were bound by the determination of the acreage limitation issue when neither of the parties litigating that issue wished to see the acreage limitations apply in the Imperial Valley, *Aerojet-General Corporation v. Askew*, 511 F.2d 710, 720-721 (5th Cir. 1975), *reh. den.*, 514 F.2d 1072 (1975), or whether important policy considerations mandate the inapplicability of *res judicata* principles in litigation of the acreage limitation question.

IV. Statutory Construction.

The enactment of the Boulder Canyon Project Act was not due solely to the problems of the Imperial Valley. A canal to the Valley running entirely within the United States had been desired for many years, and the District, unable to construct the necessary facilities with its own resources, had turned to Congress for assistance. In addition, however, the Project Act was the outgrowth of extensive concerns of the seven Colorado River Basin states over allocation of river water on an equitable basis, the control of flooding, and the more productive use of the water. Moreover, international considerations were involved because of Mexico's interest in the Colorado River. The history of the Project Act summarized in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), need not be repeated here. See also *Arizona Power Authority v. Morton*, 549 F.2d 1231, 1233-1234 (9th Cir. 1977). For present purposes, it is sufficient to say that Congress recognized that the problems could not be handled on a local or even state-by-state basis, and that the matter had become a pressing national concern.

At the same time as the concerns and proposals culminating in the passage of the Project Act had been occupying the attention of Congress, various revisions of the general reclamation laws, culminating in Section 46 of the Omnibus Adjustment Act of 1926, had been enacted into law. Section 12 of the Project Act defined the term "reclamation law" to include the Reclamation Act of 1902 "and the Acts amendatory thereof and supplemental thereto," 43 U.S.C. § 617k, and Section 46 would be included in that definition. Section 14 of the Project Act stated that the Act was a "supplement" to the reclamation law. 43 U.S.C. § 617m. By the operation of Sections 12 and 14, the Project Act was incorporated into the framework of the reclamation laws, including Section 46, that had recently been considered by Congress and that had also been the subject of national concern for some time.

Section 1 of the Project Act, 43 U.S.C. § 617, authorizes construction of "a main canal and appurtenant structures located entirely within the United States" to deliver water

from the Colorado River to the Imperial and Coachella Valleys. While providing that there be no charge for the water or the "use, storage, or delivery" of the water, Section 1 requires that expenditures by the United States for the "main canal and appurtenant structures" be reimbursable "as provided in the reclamation law." Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), mandates that reimbursement be secured by the Secretary of the Interior:

> by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

Section 14 of the Project Act reinforces the command of Section 4(b) by providing that the "reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. The Project Act thus explicitly calls for the reclamation law to govern contracts for payment to the United States for the "construction, operation, and maintenance" of the All-American Canal.

The Project Act was approved December 21, 1928, and it became effective on June 25, 1929. At that time, the portion of the reclamation law governing contracts for payment of the costs of "constructing, operating, and maintaining" works on new reclamation projects was Section 46. Section 46 requires that such contracts provide that private lands in excess of 160 acres should not receive water from the reclamation project unless the owners agree to sell their excess lands according to the scheme set out in Section 46. By direct scrutiny of the statutory language, it is apparent that the acreage limitations of Section 46 apply to private lands in the Imperial Irrigation District that receive irrigation water from the All-American Canal.

The excess land provisions are an important cornerstone of the reclamation laws.[32] Congress has exempted some

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32. One treatise has commented that "[a]creage limitation is, in every respect, the most important part of reclamation law." 2 *Waters and Water Rights,* § 120 at p. 209 (1967).

projects from the operation of these provisions, but "the Congress has always made such exemption by express enactment." *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1958).[33] In the face of language directly mandating application of the excess lands provision of Section 46 to private lands in the Imperial Irrigation District, and in the absence of any language in the Project Act that is comparable to the example of a specific exemption used by the Supreme Court in the *Ivanhoe* case, the landowners nevertheless argue that various portions of the Project Act necessarily operate to create such an exemption. It is to these contentions that we now turn.

Under the Boulder Canyon Project Act, the Secretary of Interior has broad powers to allocate the waters of the Colorado River among the "Lower Basin" states of California, Nevada, and Arizona, and to determine which users within these states will receive water. The Secretary's authority to carry out these allocations is exercised through contracts made pursuant to Section 5 of the Project Act, 43 U.S.C. § 617d. *Arizona v. California, supra,* 373 U.S. at 580, 83 S.Ct. at 1487. One of the most significant limitations on this allocation power is that the Secretary is "required" by Section 6 of the Project Act to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." *Id.* at 584, 83 S.Ct. at 1489; 43 U.S.C. § 617e. Article VIII of the Colorado River Compact provides that "[p]resent perfected rights to the beneficial use of water of the Colorado River System are unimpaired by this Compact."[34] The term "present perfected rights" from

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33. Although referring to Section 5 of the Reclamation Act of 1902, this statement applies equally well to the excess land provision of Section 46 of the Omnibus Adjustment Act of 1926. The very example of a specific exemption used by the Supreme Court in fact referred specifically only to Section 46. See 68 Stat. 1190.

34. Section VIII of the Colorado River Compact also provides that the rights attached when storage of water reached a certain level. The text of the Compact can be found at 70 Cong.Rec. 324 (1928).

the Colorado River Compact is thus incorporated into and made applicable to allocation of water under the Project Act. *Arizona v. California, supra,* 373 U.S. at 566, 83 S.Ct. 1468.[35]

The Secretary's contractual powers under Section 5 of the Project Act are also limited by Section 14 of that Act which provides that "[t]his subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. It is the landowners' position that the qualifying clause of Section 14 "except as otherwise herein provided", subordinates Section 14 to other specific provisions in the Project Act that conflict with the reclamation laws. They further contend that Section 6 of the Act, in providing for the satisfaction of present perfected rights, necessarily conflicts with the application of excess land provisions of Section 46 and renders the latter provisions inapplicable in the Imperial Irrigation District.[36]

A "present perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works" as of June 25, 1929, the effective date of the Project Act. *Arizona v. California,* 376

35. The landowners also claim that Sections 8 and 13(c) of the Project Act make the Colorado River Compact applicable to the Act. However, the references to the Colorado River Compact in Sections 8 and 13(c) were used only to show that the Project Act did not change the Compact's division of water between the Upper and Lower Basins. *Arizona v. California, supra,* 373 U.S. at 566, 83 S.Ct. at 1480.

36. This argument overlooks the possibility that the Secretary may determine to allocate to the Imperial Irrigation District more water than the amount ultimately determined to be the District's present perfected rights. Water in excess of the District's present perfected rights would not be the subject of Section 6 of the Project Act and would not be protected by that Section from the operation of Section 46.

U.S. 340, 341, 84 S.Ct. 755, 756, 11 L.Ed.2d 757 (1964).[37] In the case of the Imperial Valley, it therefore becomes necessary to determine the nature of the ownership of water rights under California law.[38] Examination of California law on this point leads to the conclusion that the landowners' argument must be rejected and that satisfaction of present perfected rights is not incompatible with the application of the excess lands provision of Section 46.

No individual landowner in the Imperial Valley has filed a claim to water from the Colorado River under the terms of the Supreme Court's decree in *Arizona v. California, supra,* 376 U.S. 351-352, 83 S.Ct. 1468, and there are no records of individual claims by Imperial Valley landowners for water rights as of June 25, 1929. Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. *Merchants National Bank of San Diego v. Escondido Irrigation District,* 144 Cal. 329, 334, 77 P. 937, 939 (1904).[39] The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all the landowners in the District, *Id.* These principles of ownership have been specific-

37. As is clear from the discussion of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and Section 18 of the Project Act in *Arizona v. California, supra,* 373 U.S. at 586-587, 83 S.Ct. 1468, not all rights to water under state law control the Secretary's decisions. "Present perfected rights" are thus not the equivalent of all forms of vested rights under state law.

38. It had been stipulated below by the government that the Imperial Irrigation District possessed present perfected rights, and we see no reason at this point to disturb this stipulation. While the exact quantity of these present perfected rights has not yet been determined, such an exact accounting is not necessary to this argument of the landowners. But, see footnote 36, *supra.*

39. Three individuals filed notices of appropriation for the right to divert water for use in the Imperial Valley from the Colorado River between 1895 and 1899. Those notices were assigned to the California Development Company on the date they were recorded. The Imperial Irrigation District subsequently acquired all the assets of the California Development Company except for the latter's agricultural lands in Mexico.

ally applied to the Imperial Irrigation District. *Hall v. Superior Court,* 198 Cal. 373, 383, 245 P. 814, 818 (1926).

The concept of an irrigation district's ownership of water rights in trust for the common benefit of landowners within the district is derived from the California doctrine that the use of appropriated water is a public use. Thus, the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to the water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated by that water thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district. The right of any individual landowner to the use of water, which must be a public use, comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated. *Madera Irrigation District v. All Persons,* 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra; Jenison v. Redfield,* 149 Cal. 500, 87 P. 62 (1906).

A consequence of this rule is that no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights. As new landowners and as new lands come within the jurisdiction of the irrigation district, they are entitled to use their proper share of the water, and the shares of all landowners would have to be redistributed. *Madera Irrigation District v. All Persons, supra,* 47 Cal.2d at 692, 306 P.2d at 893.

It follows that all the present perfected rights owned by the Imperial Irrigation District as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present perfected rights by the Secretary of the Interior in the allocation of Colorado River water therefore only concerns the total quantity of water to be supplied to the Imperial Irrigation District and does not concern supplying any particular

amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District. The District would have to redistribute its deliveries if certain lands became ineligible for delivery of water, but the satisfaction of the District's total present perfected rights would not be impaired by the operation of Section 46. Furthermore, redistribution of deliveries in accord with the excess lands provisions of Section 46 would not violate the trust under which the Imperial Irrigation District owns the water rights for the common benefit. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 712, 3 Cal.Rptr. 317, 329, 350 P.2d 69, 81 (1960). Section 6 of the Boulder Canyon Project Act, therefore, does not preclude application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926.

The landowners next argue that the overall scheme of the Boulder Canyon Project Act is inconsistent with Section 46.[40] They point out that Section 46 combines a variety of provisions while the Project Act is composed of different sections dealing separately with different subjects. In itself, this hardly makes the two statutes incompatible. Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), required the Secretary of the Interior to make provisions for reimbursement revenues before money was appropriated or construction began on the Canal, while Section 46 permits execution of a repayment contract upon completion of the project but before commencement of water deliveries. In this respect, the Project Act's modification of Section 46 deals only with the time for securing repayment and does

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40. This argument would apply to all water deliveries through the All-American Canal, including delivery to the Coachella Valley. Cf. footnote 36, *supra.*

not mean that all other substantive provisions of Section 46 are incompatible with the Project Act. [41]

The landowners point out that Sections 1 and 4(b) of the Project Act require reimbursement only for the capital costs of the "main canal and appurtenant structures to connect the Laguna Dam" while exempting users in the Imperial Valley from repayment obligations for the costs of water storage facilities. 43 U.S.C. §§ 617, 617c(b). Nevertheless, the Project Act still required reimbursement of substantial sums of money. This partial relaxation of Section 46's requirement of reimbursement of the capital costs of all project works does not make the other provisions of Section 46 inapplicable. The landowners also note that Section 46 requires a contract while Section 4(b) of the Project Act requires the Secretary to insure repayment "by contract or otherwise." Whatever might be the case if the Secretary had "otherwise" insured repayment, the method chosen in the case of the Imperial Valley was a contract.[42]

The landowners further argue that Section 5 of the Project Act, 43 U.S.C. § 617d, prescribes conditions to govern water delivery contracts and that this Section requires the contracts to conform to Section 4(a) of the Project Act, 43 U.S.C. § 617c(a). They then argue that Section 4(a) contemplates the unconditional delivery of water to satisfy present perfected rights and says nothing about conforming to the reclamation laws. Sections 1 and 4(b) of the Project Act, they argue, contain references to reimbursement "as provided in reclamation law", but the landowners argue

41. Similarly, we attach no significance in this context to the fact that Section 2(a) of the Project Act, 43 U.S.C. § 617a(a), establishes a special fund, the Colorado River Dam Fund, that is not envisioned by Section 46 and that is to receive all payments made for projects constructed pursuant to the Act.

42. The landowners fail to note that if the Secretary "otherwise" insures repayment, Section 4(b) still requires that it be done "in the manner provided in the reclamation law" and that at the time the contract was made there was no means authorized by the reclamation law, other than the type of contract involved here, for insuring repayment.

that these provisions are distinct from the provisions governing the delivery of water in Sections 4(a) and 5. They argue that it would be logical to place a condition that the delivery of water be subject to the reclamation laws in the section of the Project Act specifically governing such deliveries and that the failure to place such a condition in that section (and specifically placing such a condition in another section of the Project Act) means that there is no such condition on deliveries under Section 5.

This argument overlooks the fact Section 4(a) deals with interstate allocations of water and that conditions on the Secretary's authority under Section 5 are also contained in other sections of the Project Act. For example, Section 6, as previously urged by the landowners, is a significant limitation upon the authority conferred by Section 5. Similarly, as discussed previously, Section 14 is also a significant limitation. The Section 4(a) limitation specifically incorporated into Section 5 is no stronger than the Section 6 limitation that is not specifically referred to in Section 5, and, as held earlier, the Section 6 limitation is not incompatible with the application of the excess lands provision of Section 46.

The landowners' [sic] next argue that Section 14 of the Project Act applies, by its terms, only to the "construction, operation, and management" of project works and not to the delivery of water. They claim that these terms refer only to the business and fiscal aspects of the project and not to matters of "social control" such as acreage limitations. They claim their argument is bolstered by the fact that the Project Act employs language in other sections that distinguishes between "construction, operation, and maintenance" and "delivery" of water.[43] This argument overlooks the

43. Compare Section 10, 43 U.S.C. § 617i, with Section 5, 43 U.S.C. § 617d, and Section 1, 43 U.S.C. § 617, with Section 4(b), 43 U.S.C. § 617c(b). See also Section 7, 43 U.S.C. § 617f. However, Section 8(b), 43 U.S.C. § 617g(b), appears to include delivery and use of water within the activities of construction, operation, and management. This argument would apply to all water deliveries through the All-American Canal. See footnotes 36, 40, *supra*.

fact that the contracts with irrigation districts required by Section 46 are themselves only for the reimbursement of the "cost of constructing, operating, and maintaining the works during the time they are in control of the United States" and that the Section 46 contracts with the irrigation districts are not for delivery of water. The requirement that excess lands shall not receive water is a condition, basic to achieving a central purpose of the reclamation laws, to be incorporated into a Section 46 contract with an irrigation district for "construction, operation, and maintenance" of a project. Under the Project Act, Imperial Valley landowners were only required to reimburse the United States for the "construction, operation, and management" expenses connected with the All-American Canal. They were not to be charged for any portion of the construction of Boulder Dam (the main storage dam) or for the use or delivery of the water. It was natural, therefore to have separate provisions dealing with the delivery of water, where no reimbursement was required, and with the construction of the Canal where reimbursement was required. With regard to the latter, as has previously been discussed, not only Section 14 but Sections 1 and 4(b) of the Project Act mandate application of Section 46 to reimbursement contracts. In this context, any differentiation in Project Act provisions for delivery of water and construction of the Canal is nothing more than a reflection of the fact that the Imperial Valley did not have to fully repay the United States for the benefits received under the Act but that repayment contracts for the benefits that did have to be reimbursed still had to be in accord with the reclamation law and Section 46.

The final statutory construction argument asserted by the landowners is based on Section 9 of the Project Act which provides for the disposition of public lands that could be practically irrigated and reclaimed by the project works authorized by the Act. 43 U.S.C. § 617h. This Section directed the Secretary to withdraw these public lands from entry and authorized re-opening them to entry at a later date. Lands subsequently opened for entry were to be in tracts in various sizes to be determined by the Secretary, with no tract larger than 160 acres. Section 9 also granted

an exclusive entry preference to veterans for a period of three months, subject to the qualifications requirements of 43 U.S.C. § 433. The landowners argue that the references in Section 9 to other statutes would not have been necessary if Section 14 of the Project Act generally incorporated the reclamation laws into the Act. They then argue that the specific references to other statutes in the Section of the Project Act dealing with public lands and the absence of any specific provisions dealing with excess private lands means that the excess lands provisions of Section 46 cannot apply to private lands benefiting from the Act.

The landowners are reading too much significance into Section 9's references to other statutes. The reference to a 160-acre limit on tracts of public land merely limits the Secretary of the Interior's discretion in determining tract sizes. Otherwise, Section 9 requires the opening of public lands for entry "in accordance with the provisions of the reclamation law" — a general reference to reclamation law similar to the general reference in Section 14. Similarly, the exclusive preference given to veterans by Section 9 has no counterpart in the general homestead laws, as incorporated into the reclamation law by 43 U.S.C. § 432,[44] so this preference had to be qualified by a specific reference to 43 U.S.C. § 433. To use these two minor qualifications by reference in Section 9 to create an exemption for private lands from the excess land laws in face of the strong national policy of generally enforcing those laws, the specific incorporation of reclamation law in Section 14 of the Act, and the lack of any specific exemption from the operation of the excess land laws in the Project Act puts a far too strained reading on Section 9 which cannot be accepted.

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44. The time limit on preferences when the Project Act was passed was, in the discretion of the Secretary of the Interior, 90 days or more. See 42 Stat. 358 (January 21, 1922), later codified without relevant change as 43 U.S.C. § 186. Section 9 of the Project Act limits the preference period to exactly three months. (Except for lands in Alaska, the homestead laws were repealed effective October 21, 1976, by Public Law 94-579, Title VII, § 702, 90 Stat. 2787.)

V. Legislative History.

A series of bills introduced by Congressman Swing and Senator Johnson (both of California) in the 67th, 68th, 69th, and 70th Congresses, and known as the Swing-Johnson bills, culminated in the passage of the Project Act by the 70th Congress in December of 1928. The bills generated a great deal of controversy, especially because of the opposition of Arizona's Congressional delegation. However, despite hearings by committees of both the House and Senate considering each series of Swing-Johnson bills and extensive debates on the fourth and last Swing-Johnson measures that ultimately became the Project Act, the legislative history concerning the acreage limitation provisions of the reclamation laws is relatively meager. In reviewing this history, it is important to remember that the landowners seek to find in it a specific exemption that cannot be found in the actual language of the Project Act.

The relevant legislative history begins with the third series of Swing-Johnson bills introduced during the 69th Congress.[45] A bill introduced by Congressman Swing, H.R. 6251, was referred to the Department of the Interior, redrafted, and re-introduced as H.R. 9826. As redrafted, H.R. 9826 contained a provision identical to that eventually enacted as Section 14 of the Project Act.

During hearings on that bill, Congressman Swing informed a House committee that, in his opinion, the bill did not require a private landowner to sell lands in excess of 160 acres at prices to be fixed by the Secretary of the Interior. This statement was not made with reference to any particular portion of the bill. It was accompanied by Congressman Swing's misleading testimony that there were only one or two large landholdings in the Imperial Valley.[46]

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45. The landowners rely on a brief exchange during committee hearings in 1924 on the second Swing-Johnson bill. However, this bill was never reported out of committee.

46. While the average size of an Imperial Valley farm in the 1920s may have been less than 160 acres, there were several over 320 acres. Taylor, *Water, Land, and Environment, etc.*, 13 Natural Resources Journal 1, 4 (1963).

At the same time, the Commissioner of the Bureau of Reclamation told the committee that the bill permitted landowners to retain their farms intact no matter how large their holdings. However, he added that "old" lands, i. e., lands presently irrigated without the benefit of a federal reclamation project, would be sold water under a Warren contract.[47]

The Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525.[48] Under that Act, water stored by a federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects." 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in Section 46, does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524.

The committee was thus being told by the government agency responsible for drafting H.R. 9826 that there was no applicable divestiture provision for excess lands but that the general language incorporating the reclamation law incorporated the Warren Act which did limit the amount of water a landowner could receive.[49] It is significant that these hearings were held in February and March of 1926 while Section 46 was not enacted into law until May of 1926.

After completion of the House hearings, the committee amended H.R. 9826 by adding a specific acreage limitation provision similar to the divestiture provision of Section 46. There is no contemporaneous explanation of the committee's

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47. Hearings on H.R. 6251 and H.R. 9826, 69th Cong., 1st Sess. (1926) at pps. 32-33. It should be noted that the Commissioner also testified that there were several large landholdings in the Imperial Valley.

48. Act of February 21, 1911, ch. 141, 36 Stat. 925.

49. Congressman Swing's testimony is not inconsistent with that of the Commissioner because the Congressman discussed only divestiture of excess acreage.

reasons for adding this provision. However, in light of the view presented to the committee that the project to build the All-American Canal was viewed as a "supplemental" one subject only to the restrictions in the Warren Act, the amendment can most reasonably be construed as a decision to add an additional restriction to those already contained in the Warren Act. The bill was reported favorably to the House, but it never came up for a vote.

Meanwhile, a bill sponsored by Senator Johnson, S. 3331, was favorably reported out of committee. Although the committee report did not specifically discuss the acreage limitation question, it did note that a provision in the bill essentially the same as what eventually became Section 14 of the Project Act, made the reclamation law applicable where not inconsistent with other portions of the statute. The report noted that "[i]n a great project as this many details may properly be referable to a general law such as the reclamation act."[50] During the Senate debates on the bill, Senator Johnson emphasized that the bill was to be part of the reclamation law.[51] Although made in the context of assuring Arizona's senators that Arizona's water rights would be protected, it could hardly have escaped the attention of the Senate that by that time the reclamation law also required significant acreage limitations in its provisions for contracts with irrigation districts. Shortly thereafter, Senator Phipps of Colorado introduced an amendment to S. 3331 and a new bill as a substitute to S. 3331. Both proposals included provisions specifically incorporating acreage limitation provisions similar to Section 46 into the bill's provisions for delivery of water. Neither Senator Phipps' proposals nor S. 3331 were ever the subject of a vote in the Senate.

During the 70th Congress, Congressman Swing and Senator Johnson renewed their efforts. A House bill, H.R. 5773, containing the specific acreage limitation provision previously added by the House committee to H.R. 9826 in the 69th Congress was passed and sent to the Senate. In the

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50. Senate Report No. 654, 69th Cong., 1st Sess. (1926) at p. 28.

51. 68 Cong.Rec. 4291-4292 (February 21, 1927).

meantime, a Senate bill, S. 728, sponsored by Senator Johnson, was being considered by the Senate. It contained a provision identical to Section 14 of the Project Act but did not contain the specific acreage limitation provision found in H.R. 5773. While the Senate version was ultimately adopted, the circumstances surrounding the decision to accept the Senate version do not give rise to a conclusion that the Project Act specifically exempts the Imperial Valley from the application of the acreage limitation provisions of the reclamation law.

Senator Johnson's proposal, S. 728, was considered in committee along with S. 1274, a bill proposed by Senator Phipps. The Phipps bill included an express requirement that acreage limitation provisions be incorporated in water delivery contracts while the Johnson bill contained only the general reference to reclamation law eventually enacted as Section 14 of the Project Act. The Johnson bill was reported to the Senate, but the committee did not report the Phipps bill. The Secretary of the Interior objected to the Phipps bill because of its failure to adequately provide for the development of hydroelectric power, and his objections were incorporated into the report on Senator Johnson's bill. In addition, the Secretary's opinion that the Johnson bill, containing no specific acreage limitation provision, was similar to H.R. 5773, which did contain such a specific provision, was also incorporated into the Senate report on the Johnson bill.[52]

When S. 728 reached the floor of the Senate, it was the subject of a lengthy filibuster. During the course of the debates, Senator Hayden of Arizona, one of the bill's most ardent opponents, claimed that the bill failed to provide acreage limitations on privately owned lands receiving irri-

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52. Senate report No. 592, 70th Cong., 1st Sess. (1928) at pps. 30-31. Nevertheless, Senator Ashurst of Arizona attached a minority report that alleged, *inter alia*, that the committee had not included his proposed amendment to the bill that would have added a specific acreage limitation provision. *Id., Minority Views* at p. 26. This problem receives only two brief references in a minority report of some 38 pages.

gation water as the House bill did and proposed an amendment that would contain a specific provision comparable to the one in the House bill.[53] This was one of many amendments sponsored by the two senators from Arizona. There was no discussion of the amendment and the Senate never voted on it. The first session of the 70th Congress adjourned in May of 1928 without the Senate ever voting on Senator Johnson's bill.

When the second session of the 70th Congress began in December of 1928, Senator Johnson immediately moved to substitute H.R. 5773, already passed by the House, for S. 728 and then amend H.R. 5773 by retaining only the enacting clause and substituting S. 728 for the body of the bill. Senator Johnson assured the Senate that he wished only to "preserve orderly legislative procedure" and that the two bills contained "like purposes" and "like designs."[54] The Senate unanimously consented to his request. Senator Hayden then made a speech and engaged in an extended colloquy with Senator Johnson and others over what Senator Hayden considered the significant differences between the bill passed by the House and the Senate version which had been substituted for the House bill. It is noteworthy that at this time Senator Hayden never mentioned the absence of a specific acreage limitation provision as being a significant difference between the Senate and House bills.[55]

During the entire debate in the Senate's second session extending from December 5, 1928, until the Senate passed the bill on December 14, 1928, the acreage limitation issue was mentioned only once. Senator Ashurst complained that the bill allowed irrigation water to be delivered to landholdings in excess of 160 acres.[56] However, he made only a brief passing reference to the issue in a speech opposing the bill

53. 69 Cong.Rec. 7634-7635 (May 2, 1928). See also 69 Cong.Rec. 9451 (May 22, 1928).

54. 70 Cong.Rec. 67 (December 5, 1928).

55. 70 Cong.Rec. 71, 81 (December 5, 1928).

56. 70 Cong.Rec. 289 (December 8, 1928).

that extended over some 32 pages in the Congressional Record.[57] During the Senate debates in December of 1928, several amendments to the bill were brought up for a vote, but there were no votes on amendments that would have added more specific acreage limitation provisions to the bill.[58] Allocation of water from the Colorado River and control of hydroelectric power facilities were the predominant concerns of the bill's opponents. When the House considered the Senate bill and concurred in it on December 18, 1928, there was again no mention of the acreage limitation issue or the deletion of the specific acreage limitation by the Senate.

Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to

57. 70 Cong.Rec. 277-298, 314-323 (December 8 and 10, 1928).

58. The landowners emphasize the origin of Sections 4 and 5 of the Project Act, claiming Congress chose to have Section 5 contracts for the delivery of water be governed by Section 4(a) rather than by a general reference to the reclamation law. In addition, they point out that an amendment to Section 4(b) proposed by Senator Pittman was modified because of Senator Johnson's objections. The modification eliminated requiring delivery of project water in accord with the reclamation laws. See 70 Cong.Rec. 526, 577 (December 13 and 14, 1928). However, the effect of the Pittman amendment was to require the All-American Canal to be paid for under the terms of the reclamation law but without charging for the storage and delivery of the water. See 70 Cong.Rec. 576 (December 14, 1928). The end result was to adopt a provision similar to the proposal of Senator Ashurst cited on page 102 of the Landowners' Joint Consolidated Brief. In any event, as previously discussed, there is no incompatibility between Sections 4 and 5 of the Project Act and the application of Section 46.

reclamation law that were included in the Project Act. A specific acreage limitation was included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners.

In support of their position, therefore, the landowners must rely on such evidence as the failure of the Senate committee to adopt Senator Ashurst's proposed amendment or Senator Phipps' proposed bill and the failure of the Senate to adopt Senator Hayden's proposed amendment. However, statutory interpretation cannot rest on unexplained actions of a Congressional committee.[59] Similarly, we cannot interpret a statute based on inferences the landowners seek to draw from proposed amendments to legislation that were never brought to a vote or even seriously debated on the floor. It could just as reasonably be inferred that the amendments were not adopted because the legislation was considered to have already incorporated the proposed changes. *United States v. Wise,* 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.E.2d 590 (1962). Cf. *National Automatic Laundry and Cleaning Council v. Shultz,* 143 U.S.App.D.C. 274, 443 F.2d 689, 706 (D.C.Cir. 1971). The landowners also rely on statements of the bill's opponents. This type of evidence may be reliable when circumstances indicate the opponent's statements correctly indicate the views of the bill's proponents, *Arizona v. California, supra,* 373 U.S. at 583 n. 85, 83 S.Ct.

59. To the extent that there is an explanation for any of these committee actions, it is that the Phipps bill was rejected as inadequate for reasons unrelated to the acreage limitation provision.

1468. However, in this case there is positive evidence that the bill's opponents were incorrect and their objections, at least on the part of Senator Hayden, were not maintained throughout the course of the debates. In view of all the circumstances reviewed above, we cannot rely on a few statements of opponents during the course of lengthy proceedings primarily concerned with other aspects of the proposed legislation as the correct version of the Project Act's legislative history. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 203 n. 24, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

The landowners seek to bolster their argument by claiming that Congress was not concerned with lands already irrigated by private efforts when it passed Section 46. They contend that Section 46 was designed only to prevent speculative profits made on unimproved arid lands that became part of a federal reclamation project. Since Congress was unconcerned with productive lands such as those in the Imperial Valley when Section 46 was passed, their argument goes, Congress was not violating any basic policy when shortly thereafter it exempted the Imperial Valley from the acreage limitations in Section 46. If this interpretation of Section 46 were correct, there would be less of a need to find a specific exemption for the Imperial Valley in the legislative history.[60]

The landowners' interpretation of Section 46, however, is not correct. The statutory language makes acreage restrictions specifically applicable to all private lands receiving water through federal reclamation projects and makes no distinction between lands previous [sic] unproductive and lands previous productive bec. ıse irrigated by non-federal projects. Congress was well aware when it passed Section 46 that many federal reclamation projects were initiated to supplement or replace non-federal irrigation projects, as was done in the Imperial Valley. Section 46 was designed to strengthen both the anti-speculative and anti-monopoly policies of the reclamation laws, and there is no question

60. The logical extension of this argument would in fact be that acreage limitations would not apply unless Congress specifically mandated such a result.

that Congress intended it to apply to previously irrigated and productive lands such as those in the Imperial Valley. *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 1112-1113, 1119, 1121 at n. 107, 1132.

> It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.

Id. at 1143.

VI. Administrative Practice.

The landowners next claim that the actual practice of the Department of the Interior supports their position. Relying on both a legal interpretation favorable to their position and the lack of Department enforcement of the excess lands provisions of Section 46, they argue that this administrative practice is entitled to great, if not conclusive, weight in the statutory construction of the Project Act, has been ratified by Congress, and has been relied upon to such an extent that it cannot now be changed.

The legal interpretation upon which the landowners rely is a letter from Ray Lyman Wilbur, Secretary of the Interior, to the Imperial Irrigation District dated February 24, 1933.[61] It is important to examine this letter carefully before evaluating the landowner's claims.

The letter begins by referring to the then-pending suit of *Malan v. Imperial Irrigation District* and the allegation therein that, under the reclamation law, water cannot be delivered from the All-American Canal to any landowner owning more than 160 acres of land. Secretary Wilbur states that the allegation in the *Malan* litigation is an in-

61. The letter is reprinted as Appendix E to Opinion M-36675. Applicability of the Excess Land Laws [to]) Imperial Irrigation District Lands, 71 I.D. 496, 529 (1964) (hereinafter referred to as the Barry opinion.)

accurate statement of the reclamation law but that the allegation presumably refers to Section 5 of the Reclamation Act of 1902. The Wilbur letter asserts that Section 5 provides that no water shall be *sold* except under certain conditions but does not provide that no water shall be *delivered* from a canal constructed by the government and that the Project Act and the contract with the Imperial Irrigation District do not concern the sale of water and further provide that there will be no charge for the delivery of water.

This portion of the Wilbur letter, whether legally correct or not,[62] is irrelevant to the present case. It concerns only the applicability of Section 5 of the Reclamation Act of 1902. It does not purport in any way to consider Section 46 of the Omnibus Adjustment Act of 1926. The reasoning of this section of the Wilbur letter cannot apply to Section 46 because that statute does not speak in terms of the sale of water.

The next portion of the Wilbur letter states that the question of the application of the 160-acre limitation had been carefully reviewed and the conclusion had been reached that the limitation did not apply to lands "now cultivated and having a present water right."[63] This conclusion is then justified by the argument that Congress recognized that lands in the Imperial Valley had vested water rights when it provided that there be no charge for storage, use, or delivery of water and that previous decisions of the Bureau of Reclamation had held that Section 5 of the Reclamation Act of 1902 did not prevent recognition of vested water rights for areas larger than 160 acres and that it permitted continued delivery of water to satisfy vested water rights in single ownerships larger than 160 acres.[64]

62. The landowners advance this argument to justify reversal of Judge Murray's decision in the residency case. Judge Murray had rejected such an argument. *Yellen v. Hickel, supra,* 352 F.Supp. at 1305-1306.

63. 71 I.D. at 530.

64. Intertwined with this argument is the assertion, previously discussed, that Section 5 of the Reclamation Act of 1902 cannot apply because no sale of water is involved.

While this second argument is directed only at Section 5 of the Reclamation Act of 1902 and never mentions Section 46 of the Omnibus Adjustment Act of 1926, a variation of that argument with respect to Section 46 has been asserted as one of the landowners' main arguments, i.e., that the recognition of "present perfected rights" by the Project Act is incompatible with the application of the excess lands provision of Section 46. Significantly, however, the Wilbur letter makes no mention of the other landowners' assertions concerning the purported inconsistencies between the Project Act's reimbursement provisions and Section 46, the inapplicability of the excess lands provision of Section 46 because of the restricted incorporation of reclamation law by Section 14 of the Project Act, and the inapplicability of Section 46 by implication because of the public lands provisions of Section 9 of the Project Act. As to these arguments, the Wilbur letter, no matter how convincing or dubious its reasoning, can provide absolutely no support.

This letter cannot be given the weight the landowners seek. The letter was written after the Department of the Interior contracted with the Imperial Irrigation District. There is no evidence that the Department reached a conclusion before entering into the contract that the 160-acre limitation did not apply in the Imperial Valley. After a search by the Department, the only positive evidence that was uncovered on this question was that before the execution of the contract the Department had actually taken the position that the excess land laws would apply in the Imperial Valley.[65] The Wilbur letter was in response to a request for a ruling by the Imperial Irrigation District, which hoped to receive a formal ruling that acreage limitations did not apply but did not want a formal ruling if the conclusion came out the other way.[66] No formal opinion on this issue was prepared by the Solicitor of the Department at that time.[67]

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65. 71 I.D. at 509 n. 25.

66. *Id.*

67. After the Wilbur letter was issued, representatives of the Imperial Irrigation District expressed concern that the letter did not discuss *(Footnote continued on next page.)*

Doubts as to the legal validity of the Wilbur letter arose within the Department in 1944. The Coachella Valley in California also received water through the All-American Canal. The original contract with the water district in that Valley contained no specific provisions for enforcement of the excess land laws. During negotiations for a supplemental Coachella contract, the Bureau of Reclamation, believing that the acreage limitations applied, requested a formal ruling from the Solicitor.[68] The resulting opinion of Solicitor Fowler Harper, approved by the Secretary of the Interior in 1945, determined that the excess land provisions of the reclamation laws applied in the Coachella Valley and that nothing in the Boulder Canyon Project Act precluded their application to that Valley. The Harper opinion criticized the Wilbur letter as an informal decision designed to help the Imperial Irrigation District in the litigation then pending in state court concerning the validity of the District's contract. However, the Harper opinion did not directly overrule the Wilbur letter. Instead the Wilbur letter was distinguished on the basis that it applied only to the Imperial Valley and did not cover the Coachella Valley.[69]

After the Harper opinion was issued, the Veterans of Foreign Wars inquired in 1948 about the inconsistency of application of the 160-acre limitation in the Imperial and Coachella Valleys. The Secretary of the Interior at that time, Julius A. Krug, responded in a letter which did not

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the applicability of Section 46 of the Omnibus Adjustment Act of 1926. A letter from Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, to the Bureau's Regional Counsel in Los Angeles, dated March 1, 1933, took the position that the same principle discussed in the Wilbur letter with respect to Section 5 of the Reclamation Act of 1902 applied to Section 46. See Appendix F to the Barry opinion. 71 I.D. at 531-532. There is no claim that this letter should be considered as an administrative construction of the Project Act to which the courts should defer.

68. 71 I.D. at 514.

69. Solicitor's Opinion. M-33902 (May 31, 1945), found as Appendix H to the Barry opinion, 71 I.D. at 533-548.

attempt to legally justify or explain any inconsistencies between the Harper opinion and the Wilbur letter. Instead, Krug justified the non-application of the 160-acre limitation in the Imperial Valley on the ground that owners and subsequent purchasers of land in the Imperial Valley were entitled to rely upon the Wilbur letter and it would be unfair to change the situation even though the legal validity of the conclusions in the Wilbur letter might be questionable.[70]

In 1958, the question of the application of the 160-acre limitation in the Imperial Valley arose in proceedings before the special master appointed by the Supreme Court in the *Arizona v. California* litigation. The special master requested memoranda on the question and the Solicitor General then sought the views of the Solicitor of the Department of the Interior, Elmer F. Bennett. Solicitor Bennett's reply doubted that the acreage limitation question was relevant to the issues before the special master. Bennett's reply also came to essentially the same conclusion reached by Secretary Krug in 1948. Without undertaking any legal analysis of the issue, he concluded that water had been delivered pursuant to the contract since the early 1940's, that no legal challenge to the contract had been raised since the state court confirmation proceedings, that no administrative action had ever been taken to enforce the acreage limitation, and that it was no longer realistic and practicable to enforce that law even if it should have been enforced. The Solicitor General then filed a memorandum with the special master taking the position that non-compliance with the acreage limitations was not relevant to the issues before the special master. In a footnote, however, the Solicitor General's memorandum concluded that the acreage limitations of the reclamation laws applied to privately owned lands in the Imperial Valley receiving water from the All-American Canal.[71]

The only legal analysis of the Department of the Interior, therefore, which supports the landowners' interpretation of

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70. 71 I.D. at 515.

71. 71 I.D. at 515-516.

the Project Act is the Wilbur letter of 1933. That letter does not purport to deal with the questions of interpretation raised in this case. The Department of the Interior itself began to have doubts about the legal soundness of the Wilbur letter's conclusions shortly after water deliveries through the All-American Canal began in the early 1940s but continued to adhere to the practice of nonenforcement of acreage limitations in the Imperial Valley because of its previous practice of nonenforcement. Finally, the legal validity of the conclusions in the Wilbur letter were specifically rejected by the Department of the Interior in 1964.

A thorough and comprehensive opinion by Solicitor Frank J. Barry was prepared in response to Congressional inquiries in 1961 and 1964.[72] The opinion specifically rejected the legal basis set forth in the Wilbur letter for concluding that Section 5 of the Reclamation Act of 1902 still permitted deliveries of water to excess lands that had vested water rights prior to the initiation of the reclamation project. The precedents cited in the Wilbur letter were actually special cases where the government acquired existing physical irrigation facilities for incorporation into a reclamation project and were not applicable in the Imperial Valley. The Barry opinion considered the language of the Project Act, its legislative history, the Wilbur letter and previous administrative practices and concluded that privately owned lands in the Imperial Irrigation District are subject to the excess land laws.

The landowners seek to elevate the legal conclusions reached in the Wilbur letter into the binding force of law. Without setting forth the facts in each of the cases upon which they rely, it suffices to say that such a proposition is far too broad. The appropriate deference to be accorded an administrative construction of a statute is that a "consistent and longstanding" interpretation of a Congressional enactment by an agency charged with administration of that statute is entitled to "considerable weight" but it does not control the decisions of the courts. *United States v. National*

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72. The Barry opinion, fn. 61, *supra*.

Association of Securities Dealers, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen,* 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

In the case of the Wilbur letter, there is an informal opinion reached under circumstances indicating a lack of careful consideration. It does not purport to even consider the portion of the reclamation law in question in this case. The legal conclusions of the Wilbur letter have not been consistently held to be correct by the Department of the Interior. Most if not all of its reasoning was implicitly rejected in the Harper opinion of 1945 and it was explicitly rejected in the Barry opinion of 1964. The Wilbur letter does not construe ambiguous or doubtful language in the Project Act but in a rather simplistic analysis not contained in a formal opinion purports to find an inconsistency between two different statutes. It is an interpretation made after enactment of both statutes and consequently never before Congress when the Project Act was being considered. In these circumstances, insofar as the application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 is concerned, the Wilbur letter is not entitled to any deference as a proper construction of the Project Act and reclamation law. Cf. *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); *Shea v. Vialpando,* 416 U.S. 251, 262 n. 11, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974); *Zuber v. Allen, supra,* 396 U.S. at 192-193, 90 S.Ct. 314; *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 41 n. 27, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977).

It is true that, in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first upon the Wilbur letter which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter but instead decided against nonenforcement of the 160-acre limitation because it had not been enforced

before. Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer.[73]

The landowners contend that the "consistent" administrative interpretation that the 160-acre limitation did not apply to private lands in the Imperial Valley was brought to the attention of Congress and that Congressional failure to object amounts to a Congressional ratification of the Wilbur interpretation of the Project Act. Such a sweeping claim fails to stand up in light of an analysis of what can actually be considered to have been brought to the attention of Congress and the manner in which this occurred.

Many of the references in committee hearings upon which the landowners rely are brief references to the situation in the Imperial Valley contained in lengthy considerations of completely different reclamation projects such as the San Luis or Central Valley Projects. The claim of an exemption from application of the acreage limitations to private lands in the Imperial Valley was often raised by advocates of exemptions in allegedly similar situations in attempts to persuade Congress to specifically place such an exemption in another reclamation project. Rejection, or even acceptance, of an exemption claim for another project hardly amounts to deliberate Congressional consideration of the situation in the Imperial Valley. The same holds true for brief references to the Imperial Valley in government reports sent to various Congressional committees.

The best evidence the landowners can muster on this argument concerns the 1958 hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs reviewing the acreage limitation provisions in the reclamation law.[74] The

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73. Administrative practice plainly contrary to the law may be overturned no matter how long standing. *Baltimore & Ohio R. Co. v. Jackson,* 353 U.S. 325, 77 S.Ct. 842, 1 L.Ed.2d 862 (1957); *United States v. E. I. duPont de Nemours & Co.,* 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957).

74. *Acreage Limitation (Reclamation Law) Review: Hearings on S. 1425, S. 2541, and S. 3448,* Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess. (1958).

subcommittee was concerned with the future shape of the reclamation law in general and the application of acreage limitation provisions to a small number of new projects in particular. It was not concerned with legislation for the Imperial Valley. The situation in the Imperial Valley and the Wilbur letter were brought to the subcommittee's attention. Counsel for the Imperial Irrigation District testified shortly after appearing before the Supreme Court in the *Ivanhoe Irrigation District v. McCracken* litigation. His testimony echoed the theory concerning vested water rights that was enunciated by the California Supreme Court in that series of cases and was later rejected by the Supreme Court. These circumstances cannot amount to Congressional ratification by silence of the Wilbur interpretation. Significantly, the chairman of the subcommittee, Senator Anderson, was the Senator who later initiated the Department of the Interior review that culminated in the Barry opinion rejecting the Wilbur interpretation.

The landowners seek to draw favorable implications from the fact that Congress took no action with respect to private lands in the Imperial Valley when in 1946 it amended Section 9 of the Project Act dealing with public lands and when it rejected an attempt by the Bureau of Reclamation to extend its control over operation of the project works. However, there is no evidence that the acreage limitation question was brought to the attention of Congress during its consideration of these other matters. For example, the 1946 amendment to Section 9 of the Project Act merely extended the veterans of World War II and to those who served in the Coast Guard.[75] Furthermore, in contrast with the Imperial Irrigation District's dispute with the Bureau of Reclamation that the landowners refer to, Congress took no action when the present dispute over application of the acreage limitations arose after the 1964 Barry opinion, so it could be argued, in terms of the landowners' frame of analysis, that Congress acquiesced in this new interpretation of the reclamation laws. We draw neither conclusion from Congressional inactivity. The point is

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75. See 1946 U.S.Code Congressional Service pp. 1080-1081.

that in the absence of specific indications that Congress actually considered this problem, the incidents relied upon by the landowners cannot support the finding of Congressional ratification that the landowners desire.

This conclusion is buttressed by consideration of the landowners final version of this argument, i. e., that with all this information on the situation in the Imperial Valley, the repeated appropriations from 1936 to 1950 for continuing construction on the All-American Canal amounts to a Congressional ratification of the administrative construction as it is viewed by the landowners. However, the reference relied upon by the landowners to show Congressional knowledge and consideration of the Wilbur letter do not date back earlier than 1944. There is no showing of Congressional knowledge and consideration, one way or the other, prior to that year. In addition, in 1944 the Harper opinion cast considerable doubt over the validity of the Wilbur interpretation even if it did not specifically reject it in the case of the Imperial Valley, and Congress may have been aware of the later Department of the Interior opinion. Furthermore, by 1944 the Imperial Valley had already been receiving all of its irrigation water through the All-American Canal for about two years. Presented with this situation and the Harper opinion, the following appropriations may just as well be considered solely as Congressional ratification of the application of acreage limitations in the Coachella Valley. As before, the record here is too sparse and ambiguous to justify a conclusion that Congress approved of the Wilbur construction of the Project Act and the reclamation laws.

The landowners claim that it would be unfair to enforce the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 because of individual landowners reliance on the Wilbur letter and the past non-enforcement of the 160-acre limitation. The landowners raise claims here based on broad generalizations that cannot apply under the facts of the case. There are many holdings of land in excess of the 160-acre limitation in the Imperial Irrigation District before the Wilbur letter was issued and these holdings could not have been acquired in reliance upon the assurances contained in that letter. In any event,

the questions of reliance and estoppel presented by the landowners' argument here are not germane to this lawsuit. In operation, Section 46 requires compensation to excess landholders for the value of their property and their improvements to their property. It only excludes the increase in the value of the land attributable to the federal project. *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 113 n. 74, 1144.[76] Furthermore, assuming that any individual landowner can make out a claim to greater compensation based on estoppel or some other theory, compensation will be available, for if the enforcement of the conditions of Section 46 "impairs any compensable property rights, then recourse for just compensation is open in the courts." *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 291, 78 S.Ct. at 1183. Cf. *United States v. Union Oil Company of California,* 549 F.2d 1271, 1281 (9th Cir. 1977). The point is that the possibility that such compensation may be mandated cannot defeat compliance with the conditions of the reclamation laws.

In a variation on the reliance on administrative practice argument, the District relies on its contract with the United States. Article 30 of the contract paraphrases Section 14 of the Project Act. The Coachella Valley contract contains an identical section but, in addition, contains additional clauses dealing with the divestiture of excess lands. The District argues that these additional clauses would be superfluous if the section based on Section 14 of the Project Act was sufficient to incorporate Section 46. However, it should be remembered that after the Barry opinion was issued in

76. The District claims that the construction of the All-American Canal did not change the value of private lands in the District because the Canal only provided an alternate means of conveying irrigation water already supplied by non-federal enterprise. We doubt that this is the case. The location of the Canal entirely within American territory, a project the District was unable to undertake on its own, is, in itself, a significant benefit. The appraisal process takes into account the value, or lack thereof, of the federal project to the private lands. However, Section 46 would still apply because it was the intent of Congress to make small family farms the recipients of water delivered by federal reclamation projects.

1964 the District refused to agree to a supplemental contract with the United States that would govern the administration of the divestiture provisions of Section 46. From the discussion in Part IV, *supra,* it is clear that the general incorporation of the reclamation law in Section 14 of the Project Act that is carried over into the contract is sufficient to mandate application of Section 46.[77]

VII. Conclusion.

In No. 71-2124, the district court's order denying leave to intervene is reversed, the protective notice of appeal is validated, and the judgment is reversed. In Nos. 73-1333 and 73-1388, the judgment is vacated and the case is remanded with instructions to dismiss the complaint because of lack of standing.

Appendix to follow

77. For the reasons set out in Part IV of this opinion, the District's argument that separation of the contract provisions for delivery of water and for construction, operation, and maintenance of the Canal precludes application of Section 46 must also be rejected.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. IMPERIAL IRRIGATION DISTRICT, a corporation, *Appellee,* JOHN M. BRYANT, et al., *Appellees,* STATE OF CALIFORNIA, *Appellee.* BEN YELLEN, et al., *Appellants.*	No. 71-2124

[August 6, 1973]

Before: HASTIE,* MERRILL and ELY, Circuit Judges.

ORDER ALLOWING INTERVENTION

It appearing that the decision of the district court in this case, 322 F.Supp. 11 (S.D.Cal.1971) and a subsequent decision of another judge of the same court in *Yellen v. Hickel,* 335 F.Supp. 201 (S.D.Cal.1972) disclose conflicting rulings on questions of law that may significantly affect the course of economic development of the Imperial Valley of California; and it also appearing that an appeal to this court in

* Honorable William H. Hastie, Senior United States Circuit Judge, Third Circuit, sitting by designation.

Yellen v. Hickel is pending at our Nos. 73-1333 and 73-1388, but that the election of the United States, the unsuccessful plaintiff, not to take an appeal in the present case precludes appellate review unless the interested Imperial Valley landowners who are before us seeking to intervene are allowed to do so and to perfect and prosecute a protective appeal that they have noticed; and it further appearing that the order of the district court denying intervention, from which the interested landowners are now appealing, was made before the district court decision in *Yellen v. Hickel* and, therefore, that the district court could not anticipate the decisional conflict in the light of which this court now must act; and because it is the responsibility of this court to avoid, where feasible, the confusion and uncertainty that would result if two conflicting final decisions on legal issues of public and private importance should both be in force in this circuit.

Now, therefore, it is ORDERED that the order of the district court denying the petition of the appellants to intervene in this cause is reversed, and intervention as prayed is allowed nunc pro tunc and the protective appeal noticed by the intervenors is validated.

It is further ORDERED that the Clerk shall in due course calendar this appeal and the appeal in *Yellen v. Hickel* for hearing on the same day before the same panel of this court.

The parties to this appeal shall be privileged to supplement their briefs and the record heretofore filed herein.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation, Defendant-Appellee,

John M. Bryant et al.,
Defendants-Appellees,

State of California, Defendant-Appellee,

Ben Yellen et al., Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS et al.,
Defendants-Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS et al.,
Defendants-Appellants,

W. L. Jacobs et al.,
Defendants-Appellants.

Nos. 71-2124, 73-1333 and 73-1388.

United States Court of Appeals,
Ninth Circuit.

April 23, 1979.

Appeals from the United States District Court for the Southern District of California.

Before BROWNING and KOELSCH, Circuit Judges, and WOLLENBERG*, District Judge.

WOLLENBERG, District Judge:

I. Rehearing and Rehearing In Banc

In petitioning for rehearing and rehearing in banc of the decision of this Court in No. 71-2124, filed August 18, 1977, appellees Imperial Irrigation District and John M. Bryant, et al., argue that standing of the Yellen group, intervenors-appellants herein, is predicated on the erroneous assumption that if Section 46 of the Omnibus Adjustment Act of 1926,[1] 43 U.S.C. 423e, were to be enforced, land in the Imperial Irrigation District would become available at below-market prices. Said appellees further argue that

* The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.

1. In pertinent part, Section 46 provides that:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States . . . and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior.

the decision is internally inconsistent and is contrary to this Court's decisions in *Bowker v. Morton,* 541 F.2d 1347 (9th Cir. 1976), and *Turner v. Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966).

Appellees take the position that even if the Court orders enforcement of Section 46, land in the District would not become available at below-market prices, and thus the relief would not end the harm of which appellants complain as required for standing by *Bowker v. Morton,* 541 F.2d at 1350. Enforcement of Section 46 would require that landowners execute recordable contracts for the sale of land in excess of 160 acres per private owner in order to receive irrigation water on the 160 acres. Sales of land to meet the 160-acre limitation must by statute be at lower than market prices. Appellees state that Section 46 does not apply after March 1, 1978, because one-half of the construction charges for the irrigation project will have been paid. We held in *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093 (9th Cir. 1977), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571 (1977), that the statement in Section 46 that in the initial breakup of excess lands the Secretary of the Interior must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works" applies regardless of the fact that construction charges for the irrigation project have been repaid. This decision expressly applies to all federal reclamation projects subject to Section 46. *Id.* at 1118. As we recognized in our opinion of August 18, 1977, 559 F.2d at 514, 522, the irrigation works added substantial value to the land for agricultural purposes, and thus it is only reasonable to infer that sales under the *Tulare* formula will be *at* below-market prices. Indications at trial by the Solicitor of the Department of the Interior that the Department has in the past been willing to recommend that excess lands be sold at current market value does not override the fact that the Secretary of the Interior is bound by law to discount the value added by the construction project in fixing sale prices for excess lands. That there was pre-project irrigation does not excuse this requirement. *United States v. Tulare Lake Canal Co.,* 535 F.2d at 1112-14.

The decision of August 18, 1977, in this action is neither inconsistent with *Bowker* nor is it internally inconsistent. The Court in *Bowker* set forth a three-prong test for standing which we applied in the case at hand; the test requires "that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. The Court denied standing in *Bowker* to plaintiffs who sought enforcement of the acreage limitation by sale of excess lands at "reasonable" prices. Intervenors in the acreage case presently before us do not seek what this Court cannot provide, namely sale of land at any specified price defined by what price was "reasonable." Intervenors in the acreage case merely seek enforcement of the requirement in Section 46 that sales be at prices below current market value. The Court can issue a decree enforcing that code section that will ensure that any sales arising out of the acreage case are at below-market prices. While it is true that landowners cannot be forced to sell their lands, it is only reasonable to assume that some land will become available for sale rather than being put into other than agricultural uses.

For the same reason, our decision is not internally inconsistent. Although the parties who claim standing to bring the issues before the Court are essentially the same in both the residency and the acreage cases, as we stated in our opinion, 559 F.2d at 522, relief from the harm in the residency case is much more speculative than it is in the acreage case. In the residency case, plaintiffs seek to purchase land at prices they could afford, whereas in the acreage case this same group alleges a desire to purchase land at below current market prices. The Court's order in the residency case cannot ensure sale of land at affordable prices, but in the acreage case it can enforce the pricing requirement of Section 46. Furthermore, in the residency case there is the alternative present for third party landowners of moving into the District which is not present in the acreage case.

Another reason our decision is not inconsistent with *Bowker* is that plaintiffs in *Bowker* did not even allege a desire to purchase land should it become available for sale,

whereas intervenors in the acreage case did allege such a desire.[2] The appellate court in *Bowker* stated that one reason it denied standing in that case was that plaintiffs did not allege that they sought to purchase land. 541 F.2d at 1350. Plaintiffs in *Bowker* also were not shown to meet the eligibility requirement to purchase land made available for sale as they were not residents of the district in which they sought to have the statute enforced. The gravamen of the complaint of the *Bowker* plaintiffs was that they were subject to a competitive disadvantage as farmers in a federally irrigated area in which the acreage limitation was in effect because the limitation was not being enforced in a state service area. Similar infirmities in the group of plaintiffs distinguish *Turner* v. *Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966), from the case at hand in that plaintiffs denied standing in that case did not allege a desire to purchase land in the irrigation district upstream as to which they sought to have the acreage limitation enforced.

Finally, although the Court in *Bowker* did indicate that in that case a court order discontinuing delivery of water to excess lands would not insure that the remedy sought of making land available for sale would result, the record in this case supports a different conclusion. This is not a case where "the solution to [intervenors'] problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by [intervenors]." *Bowker v. Morton,* 541 F.2d at 1350 (citation omitted). Both the District and the landowners are parties to the action, the latter having intervened as defendants below. Thus, both will be bound by a decree holding Section 46 applicable to excess lands and ordering a cutoff of water to any such lands where recordable contracts have not

2. The Amendment to Complaint in which the *Bowker* plaintiffs alleged a desire to purchase land in the area in question was not considered filed by the district judge because it had been filed without leave of court. Order filed August 2, 1973, *Bowker v. Morton,* No. C-70-1274. The First Amended Complaint filed by order of court thereafter on February 8, 1974, did not allege a desire to purchase land.

been executed. It is also clear from the record in this case that land in the Imperial Valley has long been devoted to agricultural use, that the entire economy of the Valley is based on agriculture and agricultural support industries, that the particular 233,000 acres involved constitutes some of the finest agricultural land in the world, and that federal irrigation facilities provide the only assured source of water in the Valley. Thus, "it [is] highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46." 559 F.2d at 522. *Compare id. with Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 43, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

The petition for rehearing of appellee State of California on the ground that the Court's opinion does not place a proper emphasis on the Wilbur letter and questions of fairness stemming therefrom is also denied. Appellees raise nothing that was not thoroughly considered in reaching the Court's decision.

Judges Browning and Koelsch have voted to reject the suggestions for a rehearing en banc, and Judge Wollenberg has recommended rejection of the suggestions for rehearing en banc. The full Court has been advised of the suggestions for en banc rehearing, and no judge of the Court has requested a vote on the suggestions. Fed. R.App.P. 35(b).

Accordingly, the suggestions for a hearing en banc are rejected.

II. Attorneys' Fees

Appellants move for attorneys' fees for the appeal of action No. 71-2124 in which they were successful in reversing the district court decision. As a consequence of the appeal, an estimated 233,000 acres of agricultural land will become available for purchase at below-market prices in parcels of 160 acres or less. Appellants advance two theories to support their claim for attorneys' fees: that the Civil Rights Attorneys' Fees Award Act of 1976 provides for counsel fees in cases brought under 42 U.S.C. § 1983 and that counsel fees may be awarded where, as here, a suit confers a substantial benefit to a class.

The argument that the Civil Rights Attorneys' Fees Award Act of 1976 entitles counsel to fees in this action is specious. That Act provides for the award of counsel fees in cases brought to enforce the civil rights laws, including 42 U.S.C. § 1983 which creates a cause of action for a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Relying on the language of section 1983, appellants argue that the Civil Rights Attorneys' Fees Award Act of 1976 should be interpreted broadly to allow fees in cases which secure rights guaranteed by federal laws as well as those actions based on the federal Constitution. *Citing Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974). There is no need to reach this question, nor need we decide whether this lawsuit's vindication of the statutory rights of appellants was sufficient to make out a claim under 42 U.S.C. § 1983. This action was not brought pursuant to that code section, and therefore there is no statutory basis for the award of fees.

The theory that attorneys' fees should be awarded because this appeal will confer a substantial benefit on an ascertainable class has more promise for appellants,[3] but on analysis also fails to support an award of fees in this case.

The "substantial benefits" exception to the traditional rule disfavoring awards shifting legal fees is well recognized, *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), and survives the rejection in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) of the more sweeping "private attorney general" theory of counsel fees recovery. *See id.* at 257, 264-65 n.39. 95 S.Ct. 1612. The justification for this exception is that identifiable persons who benefit substantially from action of the party seeking fees should share the costs. "To allow the others to obtain full benefit

3. Appellants do not seek fees on the "common fund" theory, from which the substantial benefit theory derives. No basis for such a claim appears, as no "identifiable fund" has been "create[d], discover[ed], increas[ed], or preserv[ed]" by appellants' successful appeal. *Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 768-69 9th Cir. 1977).

from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills,* 396 U.S. at 392, 90 S.Ct. at 625. *See also Hall v. Cole,* 412 U.S. 1, 5-6, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). However, because the beneficiaries frequently are not parties or members of a certified class before the court, this exception is subject to an important limitation that bars an award in this case. The limitation is that there must be before the court a party against whom the court can assess fees who stands in such a relationship to the benefited class that the award will "operate to spread the costs proportionately" and "with some exactitude" among the identifiable beneficiaries of the fee-seeker's success. *Mills,* 396 U.S. at 394, 90 S.Ct. at 626; *Alyeska,* 421 U.S. at 265 n.39, 95 S.Ct. 1612. Only when this is true will attorney's fees be effectively spread among those who stand to gain from the litigation without contributing to it, rather than simply being shifted to the loser.[4]

The two leading Supreme Court cases are illustrative. In *Mills,* a shareholder prevailed in an action to set aside the merger of his corporation into another because in recommending approval of the merger the directors of his corporation had failed to disclose that they were controlled by the acquiring company. The Court shifted the shareholder's attorney's fees to the corporation because the suit conferred a substantial benefit on all shareholders and the corporation itself, and because "[T]he court's jurisdiction over the corporation as the nominal defendant ma[kes] it possible to assess fees against all of the shareholders through an award against the corporation." 396 U.S. at 395, 90 S.Ct. at 627. All shareholders benefited from vindication of the securities fraud rules and, by requiring the payment of the counsel fees from the corporate treasury, all would be taxed their proportionate share of the costs

4. As the *Mills* Court put it: "[t]o award attorneys' fees in such a suit to a [successful] plaintiff . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 396-97, 90 S.Ct. 616, 628, 24 L.Ed.2d 593 (1970). *See also Hall v. Cole,* 412 U.S. 1, 6, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1973).

through lowered dividends. The reasoning in *Hall v. Cole* is similar: the plaintiff-union member vindicated rights of free speech in union affairs and thus "rendered a substantial service to his union as an institution and to all of its members" (412 U.S. at 8, 93 S.Ct. at 1948); shifting plaintiff's counsel fees to the union would effectively charge all of the members with the cost of achieving the common benefit by taking a share of each member's dues.

Appellants urge, without supporting analysis, that their case is analogous to *Mills* and *Hall v. Cole.* If this is so, it must be because their success benefited a distinct class (those who will purchase excess irrigated land as a result of enforcement of the acreage limitation[5]), and because a suitable party is present (the District) against whom counsel fees can be assessed. Appellants satisfy the first requirement but not the second.

The class of beneficiaries to which appellants point is suitably "small in number and easily identifiable" (*Alyeska,* 421 U.S. at 264 n.39, 95 S.Ct. at 1625) to permit recovery under the substantial benefit theory.[6] It is not determina-

5. Appellants do not describe the precise nature of the benefits this class will reap, although the primary benefit — the chance to buy land below market price — is evident. If the benefits are pecuniary only, the substantial benefits theory may be unavailable. *See Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 768-69 & n.7 (9th Cir. 1977). *But see Mills v. Electric Auto-Lite Co.,* 396 U.S. 275, 394 & n.19, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1970) (approving cases applying theory to pecuniary benefits). We assume without deciding that appellants' success in this case will produce non-pecuniary as well as pecuniary benefits, and that the substantial benefits theory is available where the benefits are mixed.

6. Appellants estimate that, as a result of their appeal, 233,000 acres of excess land will be freed for sale. If those lands are purchased in parcels of the maximum size (160 acres), approximately 1,450 parcels would be available. Smaller parcels would increase the number of beneficiaries in the class, but there can be little doubt the number would remain suitably small. Cf. *Burroughs v. Bd. of Trustees,* 542 F.2d 1128, 1132 (9th Cir. 1976) (no basis for determining size of the beneficiary class); *Brennan v. United Steelworkers of America,* 554 F.2d 586, 606 (3d Cir. 1977) (classes of 1,400,000, of 8,987, of 85,000, and of 250,000 are small enough).

Moreover, members of the beneficiary class can be readily identified by their land purchases.

tive that individual members of the class will not be identifiable unless and until excess land is sold below market value as a consequence of appellant's lawsuit. Ready identifiability is required to insure clear, concrete evidence that the fee-seeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries — those who would be unjustly enriched by not sharing in the cost of producing the benefit — and not against persons whose positions are not substantially bettered because of the victorious lawsuit. If clear identification of the beneficiaries will come about reasonably soon after conclusion of the lawsuit, the substantial benefit theory may be available to authorize a fee award, although fixing and collecting the award would have to await identification of the beneficiaries. Cf. *Van Gembert v. Boeing Co.,* 573 F.2d 733, 736-37 (2d Cir. 1978).

But appellants fail to satisfy the second requirement: they have made no showing that the District is a proper party to be charged with appellants' attorneys' fees under the substantial benefit theory. The District is not in the same position as the corporation in *Mills* or the union in *Hall v. Cole.* In those cases the beneficiaries had pre-existing relationships with the corporation or union, and had contributed funds to the treasury from which the fee award was to come.[7] Thus, because the result secured in *Mills* and *Hall v. Cole* was, by its nature, of benefit to each shareholder or union member, the court had "reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting" through charging fees to the treasury to which each shareholder or union member had contributed in common. *Alyeska,* 421 U.S. at 265 n.39, 95 S.Ct. at 1625 n.39. Cf. *Skehan v. Bd. of Trustees of Bloomsburg State College,* 538 F.2d 53, 56 (3d Cir. 1976) (en banc). In this case, the result achieved is not beneficial to all landowners within the District. Those who own excess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands. If appellants' attorneys' fees were drawn from the District's general revenues, there

7. *See* Note, *Fee Awards and the Eleventh Amendment,* 88 Harv.L. Rev. 1875, 1883 (1975).

would be no congruence between the funds disbursed as the fee award and the funds taken in from the beneficiary class in whose name that award is made.

Appellants suggest no alternative method of using District revenues as a vehicle to procure fees from the as-yet-unidentified beneficiaries. Their motion is to charge the District now for their fees. If an alternative is possible,[8] appellants have not advanced it, and the District has had no opportunity to respond. There is no basis before us for assessing attorneys' fees against the District.

III. Costs

Appellants who were successful on appeal in No. 71-2124 have submitted a bill of costs in timely fashion pursuant to Federal Rule of Appellate Procedure 39(c). Appellants in Nos. 73-1333 and 73-1388, who were successful on appeal of the issues raised in those cases, did not submit a timely cost bill because they believed that these three cases had been consolidated for appeal and that therefore under Federal Rule of Appellate Procedure 39(a), a split decision had been rendered, and no party was entitled to costs because this Court did not order that costs be allowed.

8. It might be suggested that the District could use its powers to levy assessments against land with the District (*see* Cal. Water Code §§ 25500-26500) or to collect charges for water service to District landowners (*id.* §§ 22280-22283) to pass fee costs on to the beneficiaries. We do not know whether the District has the power under state law to tax such supplemental amounts against a distinct class of landowners. We do not know if it would do so (assuming it has the power) absent a court order. We do not know if an order requiring such surcharges would comport with principles of comity or with the Eleventh Amendment. Moreover, we have found no case holding attorney's fees assessable against a governmental body, as opposed to a union, corporation, or similar private body, on a pure substantial benefits rationale. *See* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv.L.Rev. 849, 897, 920-21 (1975). *See also* Note, *Reimbursement for Attorneys' Fees from the Beneficiaries of Representative Litigation*, 58 Minn.L.Rev. 933, 944-45 (1974).

Appellants have not advanced this surcharge possibility. We need not pass upon it *sua sponte* and we decline to do so in light of the substantial questions it raises.

Federal Rule of Appellate Procedure 39(a) reads in relevant part that "if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court." The cases giving rise to this appeal were tried separately below, and separate judgments were rendered. This Court's order of August 6, 1973, in No. 71-2124, provided that the issues arising out of these cases would be considered together on appeal, but it did not formally consolidate the cases. Therefore the parties should be allowed costs in the case in which they prevailed. It has long been recognized that prevailing parties may be awarded costs on appeal and that such costs may be assessed against the states. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927).

The Court's opinion of August 18, 1977, in *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), should be modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph on page 520. Because that sentence mislead them, appellants in Nos. 73-1333 and 73-1388 are granted permission to file their bill of costs as received by this Court on September 8, 1977.

ACCORDINGLY, IT IS HEREBY ORDERED that this Court's opinion of August 18, 1977, in *United States v. Imperial Irrigation District*, 559 F.2d at 520, is modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph.

IT IS FURTHER ORDERED that the bill of costs heretofore lodged on behalf of appellants W. L. Jacobs, et al., in Nos. 73-1333 and 73-1388, may be filed by the Clerk and that such filing shall be deemed timely.

IT IS FURTHER ORDERED that appellants in No. 71-2124 be awarded costs in the amount of $3,218.25.

IT IS FURTHER ORDERED that appellants in Nos. 73-1333 and 73-1388 be awarded costs in the amount of $3,783.16.

APPENDIX C

UNITED STATES of America,
Plaintiff,

v.

IMPERIAL IRRIGATION DISTRICT,
a corporation, Defendant,

John M. Bryant, Robert C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Charles E. Nilson, Kakoo D. Singh, Stephen H. Elmore and John Kubler, Jr., Landowner Defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Valley in California.

State of California, Intervening
Defendant.
No. 67-7.

United States District Court,
S. D. California.
Jan. 5, 1971.

MEMORANDUM OPINION

TURRENTINE, District Judge.

I. JURISDICTION AND NATURE OF THE CONTROVERSY

This is a civil action brought by the United States. This court has jurisdiction under Title 28, § 1345 of the United States Code. An actual controversy within the jurisdiction of this court exists as to whether the land limitation provisions of reclamation law (hereinafter "acreage limitation" or "160-acre limitation") have any application to privately owned lands lying within the boundaries of said defendant Imperial Irrigation District (hereinafter "District").

The parties to this controversy are plaintiff United States of America, defendant District, landowner defendants John M. Bryant, Robert C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Charles E. Nilson, Kakoo D. Singh, Stephen H. Elmore and John Kubler, Jr., and each of them, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the District (hereinafter collectively, "landowner defendants") and intervening defendant State of California (hereinafter "California"). Heretofore, by orders duly entered, California and the landowner defendants were granted leave to intervene herein, the latter pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure as representatives of a class consisting of some 800 persons, each of whom own irrigable lands in excess of 160 acres. The aggregate holdings of the members of the class were approximately 233,000 acres as of September 3, 1965.

Plaintiff contends that the 160-acre limitation applies to privately owned lands within the District; and all of the defendants contend in all respects to the contrary.

There is no controversy between plaintiff and the State of California over the application of the excess land laws to the state lands in its Imperial Waterfowl Management Area. The United States, the defendant District and private landowner defendants agree with the State of California that those state lands are not subject to the excess land laws.

This opinion incorporates the court's findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

II. HISTORICAL BACKGROUND

The Imperial Irrigation District consists of lands in the Imperial Valley in California. Due to the below-sea-level topography of the Imperial Valley area, it was recognized as early as the middle of the 19th century that irrigation by means of diversion and gravity flow from the Colorado River was feasible. In comparatively recent geologic time, the Gulf of California extended inland to the northwest. Its upper limits reached northwind of Indio. Through the

years, the heavily silt-laden Colorado River deposited sediment and built up a low, flat deltaic ridge entirely across the ancient gulf, cutting off the upper portion from its connection with the ocean. The resulting basin was then an inland sea with a surface area of nearly 2,000 square miles. The greatest depth of this sea was about 320 feet. Deprived of its connection with the Gulf of California, the severed sea dried up, and a portion of the bed which it occupied is now known as the Salton Basin. The greater area around and including this basin is known in its northern part as the Coachella Valley and in its southern part as the Imperial Valley.

In its natural condition, the entire region was an unproductive desert. The annual rainfall averages from two to three inches. The Colorado River and the Colorado River Delta east and south of the Imperial Valley are slightly above sea level. From the delta, the land slopes gradually north and west toward the center of Imperial Valley, which is almost entirely below sea level.

During occasional flooding of the Colorado River, the overflow waters would flow down the slopes of the delta northward into the bottom of the great depression and the Salton Basin. These floodwaters would concentrate more or less in depressions and channels leading from the delta region into what is now known as Salton Sea. These channels, or depressions, form natural canals for diversion of the Colorado River waters into Imperial Valley.

The initial appropriations and diversions of water from the Colorado River were made by the California Development Company, a privately owned corporation organized in 1896 and the predecessor in interest of defendant District, which was organized in July of 1911. These appropriations and diversions laid the foundation for the present perfected water rights which have admittedly existed within the boundaries of the District from and after June 25, 1929, the effective date of the Boulder Canyon Project Act.

The first water from the Colorado River was diverted and brought to the Valley in July of 1901. This water, which was diverted about one mile north of the international boundary

with Mexico, was carried by the Alamo Canal through Mexican territory and back into the United States at Imperial Valley to avoid the high mesa and sand-hill country north of the international boundary. For most of its 50 mile course in Mexico, this canal made use of an ancient overflow channel known as the Alamo River, which formerly led into the Salton Sea.

The Alamo Canal, from its point of reentry into the United States, as well as the lateral canals through which water diverted from the river was ultimately distributed to land in the Valley, were owned by seven mutual water companies which were organized by the California Development Company. The stock in such mutual water companies was ultimately acquired by the individual landowners to whose land the water was supplied.

By 1903, through the distributive facilities constructed by the local mutual water companies, approximately 25,000 acres of valley lands were in irrigated cultivation, all as a result of diversions from the River. By the following winter, the irrigated acreage was increased to 100,000. 181,191 acres were irrigated by 1910, 308,009 in 1916, 413,440 in 1919, and 424,145 in 1929, the year when the Boulder Canyon Project Act took effect.

In 1905, the Colorado River broke through its banks, which had over the years been built up above the surrounding terrain, and completely changed its course, sending a flood of water through the Alamo Canal and over the broad flat area of Imperial Valley. As a consequence, for many months the entire flow of the River passed through the washed-out heading, through the Alamo Canal and into Imperial Valley, creating Salton Sea with a surface area of 330,000 acres, and threatening the entire valley with destruction. The surface of the Salton Sea, formerly nearly dry at an elevation of 273 feet below sea level, was raised to 190 feet below sea level. The efforts of the California Development Company to close the breach were unsuccessful. The Southern Pacific Company's tracks being endangered, the Southern Pacific Company advanced funds to the California Development Company to control the River and took con-

trolling interest therein as security. By utilizing its own resources the Southern Pacific Company closed the breach in the west bank of the River and returned the River to its channel. In the Spring of 1916, the Southern Pacific Company foreclosed on the California Development Company's interests and, in June of that year, transferred them to defendant District.

In 1922-1923 District acquired all of the mutual water companies that had been organized by California Development Company. Since that time and until the present, the District has performed the entire function of diverting, transporting and distributing the water supply to farm holdings in Imperial Valley.

On November 24, 1922, the Colorado River Compact, an interstate agreement relating to allocations and rights in the waters of the River, was signed by commissioners representing the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. It became effective June 25, 1929.[1]

The construction of the All-American Canal was authorized as part of the general project authorized by the Boulder Canyon Project Act (hereinafter "Project Act" or "Act") of December 21, 1928, effective June 25, 1929, 45 Stat. 1057, 43 U.S.C. § 617 et seq.

At the time of the taking effect of said Project Act, the District had a distribution and drainage system which was wholly financed, constructed, maintained and operated by local means. The distribution system then, as of June 25, 1929, comprised approximately 1,700 miles of main and lateral canals, providing for the irrigation by waters diverted by it from the Colorado River of approximately 424,000 privately owned acres, computed on a single cropping basis. All of this acreage was, as of June 25, 1929, being irrigated by and with Colorado River water, carried

1. The Colorado River Compact was authorized by an Act of Congress dated August 19, 1921, 42 Stat. 171, and by the Acts of the Legislatures of the participating states. Congress approved it in section 13 of the Boulder Canyon Project Act, 43 U.S.C. § 6171.

through the Alamo Canal. In 1966, just prior to the bringing of this action, there were approximately 438,000 acres irrigated with water transported through the All-American Canal.

Pursuant to the Project Act, the Government constructed Hoover Dam, at Black Canyon, and incidental works, completing the construction of the dam in 1935. On February 1, 1935, under the direction of the then Secretary of the Interior (hereinafter "Secretary"), Harold L. Ickes, the Government began storing water in Lake Mead, the reservoir created by Hoover Dam, and since that date the Government has continuously operated and maintained Hoover Dam for the purposes specified in the Project Act.

On December 1, 1932, the United States and the District, acting pursuant to the Project Act, entered into a contract providing, *inter alia,* for construction of a main canal connecting Imperial and Coachella Valleys and requiring repayment by the District for the costs of construction. Due to conflicts not material to this case, Coachella Valley landowners were not included in the District, but formed a separate District, the Coachella Valley County Water District, which executed a similar, though independent, contract with the United States in 1934 calling for construction of water delivery structures and delivery to lands in Coachella Valley.

Pursuant to its 1932 contract with the District, the United States constructed Imperial Dam and the All-American Canal, commencing construction in August, 1934. In 1940, the United States, while retaining the care, operation and maintenance of these facilities, commenced delivering water through the All-American Canal for use within the District. Also pursuant to the contract, the Secretary transferred to the District, on March 1, 1947, the care, operation and maintenance of the main branch of the All-American Canal west of Engineer Station 1098.

Since 1942, the District's entire water supply has been carried through the All-American Canal. Title to the Imperial Dam and the All-American Canal, as well as to Hoover Dam, is in the United States.

On March 4, 1952, the contract between the United States and the District was amended by a supplemental contract. On May 1, 1952, the Secretary transferred to the District the care, operation and maintenance of the works east of Engineer Station 1098.

The All-American Canal System, as provided for in the contract of December 1, 1932, was declared completed by the contract of March 4, 1952, between the United States and the District; repayment of construction charges commenced on March 1, 1955. The District's financial obligation was fixed at approximately $25,000,000, repayable in forty annual installments, without interest. All such payments to date have been made from net power revenues derived from the sale of electrical energy generated by hydroelectrical facilities of the All-American Canal, costing the District approximately $15,000,000. The cost of Hoover Dam and powerplant, estimated in 1965 as $174,732,000, is being repaid with interest at three percent primarily from power revenues at the dam. One exception to this is that $25,000,000, of the cost of the dam, which was allocated to flood control, will be carried interest free by the Government until 1987.

III. DEVELOPMENT OF THE CONTROVERSY

The 1932 contract provided, *inter alia,* for repayment by the District of the cost of the project works. It did not contain any provision requiring that acreage limitation apply to private lands within the District. On February 24, 1933, Secretary of the Interior, Ray Lyman Wilbur, in a letter mailed to the District, ruled that the 160-acre limitation did not apply to privately owned lands within the District.[2]

The Wilbur ruling was followed for 31 years and gave rise to an administrative practice which held the 160-acre limitation to be inapplicable to private landholdings within the District and which endured for the same period and down to the rendition of Solicitor Frank J. Berry's opinion

2. The full text of the letter is published in 71 Decisions of the Department of the Interior 496, App. E at 529.

of December 31, 1964.[3] In that opinion, the Solicitor concluded that Secretary Wilbur's 1933 ruling was erroneous and that the Boulder Canyon Project Act by its plain terms incorporates those provisions of reclamation law which impose acreage limitation on lands served from federal reclamation projects, including the privately owned lands within the District.[4]

Subsequent to this ruling, the Department for several years attempted to negotiate a new contract with the District which would have incorporated acreage limitation. The failure of these negotiations resulted in this action for declaratory relief.

IV. THE BASIC ISSUE

The question of whether the 160-acre limitation has any application to privately owned lands within the boundaries of the Imperial Irrigation District depends upon an interpretation of the Project Act. In deciding this case, defendants urge the court to limit its inquiry to a judicial review of the 1933 Wilbur ruling. They contend that because of the longstanding administrative practice and the reliance thereon by landowner-defendants in the District, Wilbur's interpretation should be upheld if there is any reasonable basis for his decision, citing Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616, reh. den. 380 U.S. 989, 85 S.Ct. 1325, 14 L.Ed.2d 283 (1965). The court declines to follow this course and believes that this statement of the *Tallman* rule should not be controlling in this case for the following reasons.[5] In *Tallman,* the suit was brought by

3. 71 Decisions of the Department of the Interior 496.

4. The study leading up to this opinion was prompted by a letter dated August 7, 1961, from Senator Clinton P. Anderson, Chairman of the Committee on Interior and Insular Affairs, to Secretary Stewart Udall. In the letter, Senator Anderson advised the Secretary that he had received complaints from Southern California that the acreage limitation provisions of reclamation law were not being enforced in the Coachella and Imperial Valleys.

5. There is of course no quarrel with the principle that in problems of statutory construction great deference is given to the administrative interpretation. See Udall v. Tallman, *supra,* 380 U.S. at p. 16, 85 S.Ct. 792 and cases cited therein.

an unsuccessful applicant for an oil and gas lease in the Kenai National Moose Range in Alaska. For many years, the Secretary of the Interior had interpreted Executive Order 8979 and Public Land Order 487, which withdrew certain lands from settlement and commercial exploitation, as not prohibiting oil and gas leases because they were not "dispositions" as that term is found in the Executive Order 8979. The first applicants received the particular lease in question; the unsuccessful applicant asserted that these regulations had closed the lands to such leases and that his lease should be issued because the prior applicants had applied when the lands were closed under the terms of these regulations. The court held that the Secretary's established interpretation was reasonable and hence entitled to controlling weight. The court observed that great deference is given to administrative interpretation of statutes, and that:

> "When the construction of an *administrative regulation* rather than a statute is in issue, deference is even more clearly in order."[6] (emphasis supplied)

In this case, the basic problem is the meaning of an Act of Congress, not an administrative regulation. In addition, the controversy in *Tallman* was essentially a competition of private interests for commercial leases, while the decision whether acreage limitation applies under the Project Act involves important considerations of national policy, making this case less appropriate for application of the estoppel-like features of *Tallman*. If Secretary Wilbur was wrong, then he defeated a Congressional mandate extensively developed in reclamation law. Finally, in *Tallman* there was a consistent administrative practice, while here the Government has repudiated its former interpretations. The court therefore adopts the goal of determining whether Congress intended in the Project Act to apply acreage limitation to privately owned lands in the Imperial Valley.

This is the first stage of a bifurcated trial. Not included in this phase of the proceedings are the nature and extent of "present perfected rights" of the land-owner-defendants, as

6. Udall v. Tallman, *supra*, at p. 16, 85 S.Ct. at p. 801.

that term is defined in the Supreme Court decree in Arizona v. California, 376 U.S. 340, 341, 84 S.Ct. 755, 11 L.Ed.2d 757 (1964), or the issue of whether the landowners have any "vested rights" to Colorado River water as against the United States.

V. THE STATUTORY LANGUAGE

Plaintiff contends that the Boulder Canyon Project Act is a reclamation project, and that §§ 1, 4(b), 12 and 14 incorporate general reclamation law, one portion of which is § 46 of the 1926 Omnibus Adjustment Act, 43 U.S.C. § 423e. The latter statute provides that no privately owned lands in excess of 160 acres shall receive water from a new project or new division of a project. Therefore, the acreage limitation must apply to private lands within the District.

Four sections in the Project Act advert to reclamation law. Section 1 provides that construction costs for the canal are to be reimbursable as provided in the reclamation law.

Section 4(b) of the Project Act instructs the Secretary to provide for revenues

> "* * * by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law * * *"

Section 12 defines reclamation law as the 1902 Reclamation and Acts "amendatory thereof and supplemental thereto."

Section 14, heavily relied on by plaintiff, states:

> "This [Act] shall be deemed a *supplement to the reclamation law,* which said reclamation law shall govern the construction, operation, and management of the works herein authorized, *except as otherwise herein provided.*" (emphasis supplied)

Plaintiff asserts that the phrase "construction operation and management of the works" includes water delivery. Since

§ 46 of the 1926 Act was the most recent addition to reclamation law at the time the Project Act was passed, it applies to condition delivery of water upon compliance with acreage limitation.

Plaintiff continues by pointing out that §§ 1 and 4(b) of the Project Act require repayment contracts pursuant to reclamation law, and the only means of contracting in 1932 was in accordance with § 46 which required acreage limitation. Thus, the 1932 contract necessarily incorporated an acreage limitation applicable to private lands. Limited to these facts, plaintiff's theory of the statute is disarmingly simple.

Closer examination reveals, however, that the references to reclamation law are carefully qualified, most noticeably by the § 14 language that reclamation law applies "except as otherwise herein provided." And Congress has "otherwise provided" in § 5 that the Secretary may contract for storage and delivery of water.[7] Section 5 does not refer to reclamation law or acreage limitation, and this is the section where such reference would be most logical if water delivery is to be conditioned on acreage limitation. Where Congress has employed a term in one place and excluded it in another, it should not be implied in the section where it is excluded. Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963). The repayment provisions of § 4(b) are limited to expenses of construction, operation and maintenance; there is no mention in this section of water delivery.

Section 1 of the statute requires reimbursement for the main canal and auxiliary structures under reclamation law, but the clause immediately following this language, "* * *

7. Section 5 provides in part as follows:

> "[That] the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof * * * upon charges that will, * * * in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this [Act] and the payments to the United States under subdivision (b) of Section 4."

and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy * * *," suggests that the reference to reclamation law merely establishes the principle expressly added, i.e., that the works are not to be paid for by the sale of power. Perhaps most damaging of all to plaintiff's case is the sentence next following:

> "Provided, however, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation * * * in the Imperial or Coachella Valleys."

This express exemption from charges for water is one example of the distinction between water delivery and the concepts of reimbursement for project costs and the "construction, operation and maintenance" which is drawn throughout the statute. Other examples are found in Sections 8(a)[8] and 8(b).[9] This treatment hardly supports the conclusion that the phrase "construction, operation and maintenance" in § 14 includes water delivery.

In considering plaintiff's incorporation theory, an essential inquiry is whether § 46 is consistent with other terms of the Project Act. A comparison of section 4(b) of the Project Act with § 46 of the Omnibus Adjustment Act reveals differences which point to a displacement of § 46 by the terms of the Project Act. Section 46 contracts are mandatory, while § 4(b) contracts are discretionary. Section 46 deals with both repayment and limitation on water delivery, but § 4(b) does not mention water delivery be-

8. Section 8(a) provides in part:

> "The United States * * * shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation * * * *and* the storage, diversion, delivery, and use of water * *" (emphasis supplied)

9. Section 8(b) provides in part:

> "Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, *including* the appropriation, delivery, and use of water * * * shall observe * * * the terms of such compact." (emphasis supplied) The use of the word "including" seems intended to emphasize the distinctions developed elsewhere.

cause § 5 covers that topic. And § 46 contracts must be executed before water delivery, while § 4(b) contracts are to be executed before money is appropriated. From this it appears that the only item in § 46 not expressly provided for in the Project Act is the acreage limitation, an issue of social policy and not mere technical details of contracting. It is unlikely that Congress would relegate an issue as important as acreage limitation for private lands to indirect inclusion. This belief is reinforced by § 9 of the Project Act, which expressly limits public land entries entitled to use project water to 160 acres. The absence of a similar provision for private lands indicates that Congress did not apply acreage limitation to private lands. If the Project Act did incorporate general reclamation law, then § 3 of the 1902 Act[10] would apply and the specific direction of § 9 would be unnecessary.

Plaintiff's contention that the 1932 contract between the Government and District was made pursuant to § 46 is unsupported. The contract at Article I recites that it was made pursuant to the 1902 Reclamation Act "and acts amendatory thereof or supplementary thereto * * * and particularly pursuant to" the Project Act. Consequently, the contract could simply have been made pursuant to § 5 of the Project Act and § 1 of the 1922 Reclamation Act, 43 U.S.C. § 511.[11] The mere existence of § 511 forecloses the argument that § 46 of the 1926 Act provided the only means of contracting for repayment in 1932 and indicates that if Congress had intended § 46 to apply, it would have so stated.

10. 43 U.S.C. §§ 416, 432, 434. This statute provides that public lands proposed for irrigation under reclamation projects shall be withdrawn and subject to entry under the homestead laws in tracts of not more than 160 acres.

11. 43 U.S.C. § 511 provides that in carrying out the purposes of reclamation law, the Secretary may contract with irrigation districts for repayment of the costs, of construction, operation and maintenance of irrigation works. It also recites that no such contract will be binding on the United States "until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid."

Finally, the Project Act contains a comprehensive set of provisions relating to the rights of prior appropriators of Colorado River Water under the Colorado River Compact. Section 6 of the Project Act names as the second use of the dam and reservoir the "irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact * * *" Under the decree in Arizona v. California construing the Project Act, the application of a specific quantity of water to a defined area of land is an essential element of a perfected right.[12] It was held in the court's opinion that the Secretary is required to satisfy present perfected rights.[13] This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights.

Section 8(a) of the Project Act subjects the United States and all water users to the controlling effect of the Colorado River Compact and constitutes a recognition by Congress of the guarantee of present perfected rights found in Article VIII of the Colorado Compact.

In Section 13 of the Project Act, the Colorado River Compact is approved. There is a second statement that the rights of the United States are controlled by the Compact, and the pre-project water rights are made covenants running with the land for the benefit of water users. These covenants are expressly made available to them for use in any litigation concerning Colorado River water.

The combined effect of §§ 6, 8(a) and 13 of the Project Act is to express Congressional intent that the present perfected rights be protected from interference by any contrary provision of the Project Act or reclamation law. The specific and repeated guarantees found in these sections indicate that any provision such as acreage limitation which would

12. 376 U.S. 340, 341, 84 S.Ct. 755.

13. 373 U.S. 546, at 566, 581, 584, 83 S.Ct. 1468, 10 L.Ed.2d 542.

curtail such rights would be detailed in correspondingly exact language. Neither the references to reclamation law contained in §§ 1, 4(b), 12 and 14 of the Project Act, nor any other term thereof demonstrate Congressional intention that acreage limitation apply to privately owned lands in the District.

Two additional propositions urged by plaintiff merit consideration in construing the statutory language. First, it is contended that the Project Act created a federal subsidy; and that therefore the Act must be strictly construed against the grantees (defendants). Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). However, the Project Act set in motion a great project conferring many and important benefits on all parties involved, including the United States.[14]

Among the national interests advanced by the Boulder Canyon Project are included:

(1) The inclusion within the District by annexation, pursuant to Article 34 of the contract between the Government and the District dated December 1, 1932, of some 250,000 acres of Government lands.

(2) Added capacity in the Canal for the servicing of such lands and some 11,000 acres of Indian land.

(3) Flood control for the purpose of preserving the Laguna Dam and protecting the Yuma Reclamation Project as well as protecting the public lands and private interests in Imperial Valley.

(4) The control of silt because of the federal government's problem in handling silt in the Yuma Project.

(5) The need to build a canal on All-American soil to put the United States in a position to bargain with

14. A report of the Congress which passed the Project Act detailed the benefits to all parties and described the Project as a joint venture by necessity:

> "Neither Imperial Irrigation District, the Coachella district, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." Report No. 592, 70th Congress, March 20, 1928 at p. 21.

the Mexican Government over the use of the water of the Colorado River.

(6) It enabled the United States Government to reclaim and put to use large tracts of public and Indian lands of the United States in Coachella Valley. Application of this rule of construction does not advance the search for acreage limitation in the Project Act.

In a related argument, plaintiff also contends that because there is no express exemption from the acreage limitations of reclamation law, the limitation must apply. In this matter, reliance is placed on the following statement in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1959):

> "* * * where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment."

The guidance afforded by this remark is of doubtful value in this case, because in *Ivanhoe* the legal issue was whether state law precluded applicability of acreage limitation. The case is also factually distinguishable in that one basic ingredient of the Imperial Valley situation, the guarantee of perfected rights by Congress, was wholly lacking in the Ivanhoe context.[15]

Finally, it appears that the practice, cited by plaintiff, of enacting express statutory exemptions did not come into vogue until 1938 with the Colorado-Big Thompson Project.[16] This was some ten years after passage of the Boulder Canyon Project Act.

15. Indeed, it is doubtful whether the landowners before the court in *Ivanhoe* had any vested rights which Congress could have guaranteed. Certainly the landowners in the Ivanhoe District itself did not. See Ivanhoe Irr. Dist. v. All Parties and Persons, 47 Cal.2d 597, 654, 658, 306 P.2d 824 (Dis. op.); Ivanhoe Irr. Dist. v. McCracken, *supra*, 357 U.S. 275, 285, 78 S.Ct. 1174, 1180: "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right."

16. 43 U.S.C. § 386.

VI. LEGISLATIVE HISTORY

Secure in the belief that the statutory language clearly precludes an incorporation of acreage limitation, the court approaches legislative history with reluctance. The perils inhering in an imaginative recreation of the mind of Congress have been described by Mr. Justice Jackson, who termed the process a "psychoanalysis of Congress."[17] The language sought in the halls of Congress can usually be found in one place or another, and this is particularly true here, for the proceedings in Congress which culminated in the Project Act in 1928 spanned nearly a decade. However, the disagreement of experts in reclamation law, and the abrupt reversal of Departmental policy require some examination of legislative history for its teachings on Congressional intent.

The first Kettner Bill (H.R. 6044) in 1919 regarding construction of the Boulder Canyon Project did not contain an express provision for acreage limitation. In 1920, a second Kettner Bill (H.R. 11553) was introduced which contained a specific acreage limitation provision. It became apparent that more technical studies were needed before embarking on this ambitious project, and Congress in 1920 authorized a study which resulted in the comprehensive Fall-Davis Report.[18] The Report reaffirmed prior recommendations for an All-American Canal, and, based upon engineering studies of dam sites, recommended the construction of a high dam in Boulder Canyon.

Shortly after publication of the Report, Senator Hiram Johnson and Congressman Phil Swing introduced identical bills in the Senate and House proposing construction of an All-American Canal and a high dam near Boulder Canyon. These bills did not contain an express acreage limitation provision. Due to continuing controversy over dam sites, neither bill was reported out of committee during the 67th Congress.

17. United States v. Public Utilities Commission, 345 U.S. 295, 319-320, 73 S.Ct. 706, 97 L.Ed. 1020 (1953).

18. Sen.Doc. 142 Problems of the Imperial Valley and Vicinity 67th Cong. 2nd Sess. (1922).

When the 68th Congress convened, Senator Johnson and Congressman Swing again introduced identical bills, neither providing expressly for acreage limitation, but again neither bill was reported out of committee.

In the 69th Congress, Senator Johnson and Congressman Swing each introduced two more bills. During hearings in 1926 before the House Committee on Irrigation and Reclamation, the question arose whether either of the pending Swing Bills (H.R. 6251 and H.R. 9826) would make acreage limitations apply to private lands in the Imperial Valley. Congressman Swing and Dr. Elwood Mead, then Commissioner of the Bureau of Reclamation, both stated unequivocally that nothing in either of the bills would require a landowner to dispose of holdings in excess of 160 acres in order to receive water from the All-American Canal:

"MR. SINNOTT.[19] I would like to ask the doctor is there any provision in the bill sponsored by the Secretary on the farm unit on the lands to be irrigated?

"DR. MEAD. This bill does not go beyond the provisions for three things. One is the dam — the reservoir — and the second is the power plant, and the third is the All-American Canal. It does not deal with irrigation of new lands[20] at all.

"THE CHAIRMAN. [Congressman Addison T. Smith] That is reserved for future legislation?

"DR. MEAD. Yes, Sir.

"* * *

"MR. SINNOTT. The present owner can occupy his present farm unit?

"DR. MEAD. Yes, sir.

"MR. SINNOTT. *No matter what that might be?*

"DR. MEAD. Yes.

19. Congressman Sinnott of Oregon.

20. I. e., a "new" project, in the language of the Department. And § 46 of the 1926 Omnibus Adjustment Act, upon which plaintiff relies, only relates to "new" projects or "new divisions" of old projects.

"MR. SINNOTT. What is that now in the Imperial Valley?

"DR. MEAD. Of course, it varies widely. There is not any law. *There are a good many large holdings there.*

"* * *

"MR. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, as is now in the present reclamation law?

"MR. SWING. *no, sir.*" (emphasis supplied)[21]

After completion of the hearings, Congressman Leatherwood of Oregon prevailed upon the committee to amend its print of H.R. 9826 by including an amendment requiring acreage limitation provisions in all contracts for the delivery of irrigation water.[22] H.R. 9826 was reported favorably out of committee, was debated on in the House early in 1927, but was not voted upon.

On the Senate side, one of the Johnson bills, S. 3331, was also favorably reported out of committee, but a vote on this bill was blocked by a filibuster conducted by Senator Ashurst of Arizona. During the floor debates on this bill, Senator Phipps of Colorado offered two amendments which would have incorporated express acreage limitation requirements. Neither of these amendments was adopted.

While this third set of Swing-Johnson proposals did not contain specific acreage limitations provisions, it did refer to reclamation law, making the act a "supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and maintenance of the works * * *," the predecessor of § 14 of the Project Act. The advice of Dr. Mead and Congressman Swing in Committtee, and the proffered amendments containing express acreage

21. Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation, 69th Congress, pp. 32-33 (1926).

22. H.Rept. No. 1657 on H.R. 9826, 69th Cong. 2nd Sess. at pp. 29-30 (1926).

limitation provisions must be read in conjunction with this § 14 language in the bills, language which plaintiff now contends incorporates the acreage limitation features of § 46 of the 1926 Act. The timing of these occurrences is deserving of interest, for this was the Congress which months earlier had passed the Omnibus Adjustment Act of 1926 and would presumably be most sensitive to the possibility of incorporating § 46 acreage limitation into the Project Act by means of the language which was to become § 14.

The 70th Congress saw the introduction of the fourth Swing-Johnson bills, and at the outset one striking development is noted. While all previous Swing-Johnson bills had been identical, now Congressman Swing's bill, H.R. 5773, contained a specific acreage limitation proviso, but Senator Johnson's bill, S. 728, did not contain any such limitation.

H.R. 5773 was reported favorably and was passed by the House after brief debate. In the Senate, Senator Ashurst proposed another bill, S. 1274, which expressly included acreage limitation. The Senate committee refused to take action on this bill and likewise failed to incorporate an amendment by Senator Ashurst to S. 728 which would have added acreage limitation. S. 728 was reported out of committee with a recommendation for passage,[23] but Senate debate on the measure was again bogged down in a filibuster by the Arizona Senator. At the beginning of the second session, the Senate undertook consideration of H.R. 5773 under the floor management of Senator Johnson. Senator Hayden of Arizona had called attention to the discrepancy between the House and Senate versions in the matter of acreage limitation and proposed a corrective amendment. This amendment was not adopted. Senators Ashurst and Hayden on several occasions called attention to their rejected amendments and criticized the Senate bill for its lack of an acreage limitation applicable to private lands.[24]

The statements of Senators Phipps, Hayden and Ashurst recur too frequently and are too pointed to be disregarded.

23. S.Rept. 592 on S. 728, 70th Cong., 1st Sess., March 20, 1928.

24. See e. g., 69 Cong.Rec. 9451.

While the statements of opponents of a bill may not be authoritative, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticism."[25]

In this session, Sen. Johnson moved to substitute S. 728 for H.R. 5773 so as to retain the enacting clause of H.R. 5773 and the text of S. 728, leaving the potential Act without an express acreage limitation provision. Senator Johnson advised the Senate that H.R. 5773 contained "like purposes and like designs" and that the substitution was offered to "preserve orderly legislative procedure." Unanimous consent to the substitution was obtained.[26]

This action is puzzling no matter how you read the completed statute with regard to acreage limitation. Plaintiff contends that because there was unanimous consent, with no complaint even from Senators Ashurst and Hayden, the Senate believed that acreage limitation was incorporated by the general references to reclamation law and that there was no real difference. However, the numerous amendments proposed and the remarks during debate clearly show that Congress did not understand the two bills to be identical. Why someone on either side of the issue did not point to this significant difference is a question which probably cannot be answered now except by speculation.

To conclude the chronology, the Senate passed this version of the bill, and the House did likewise shortly thereafter. President Coolidge signed it into law on December 21, 1928.

There remains the question of why Congress desired to exempt these lands from acreage limitations when that policy had been a cornerstone of prior reclamation law. As noted in the discussion of the plain language of the statute, Congress enacted legislation recognizing prior rights to appropriation of Colorado River water which had been established by land cultivators in the Imperial Valley.

25. Arizona v. California, 373 U.S. 546, 583 n. 85, 83 S.Ct. 1468, 1489, 10 L.Ed.2d 542 (1963).

26. 70 Cong.Rec. 67 (1928).

The proceedings before Congress show that it was aware of the water rights held in Imperial Valley and that provisions of §§ 1, 6, 8, and 13 of the Project Act were designed to protect these rights from charges for water delivery and to insure that rights deriving from the Colorado River Compact would be recognized.[27] The steps taken to protect these rights were accomplished in recognition of the fact that the All-American Canal Project was not merely an arid lands reclamation project, but was a special purpose program designed for national purposes, including water negotiations with Mexico, as well as for regional agricultural development.

VII. ADMINISTRATIVE PRACTICE

In construing a statute, weight must be given to interpretation placed on the statute by those charged with its administration. Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). See also Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1964). Respect for administrative interpretation is particularly appropriate when the administrative practice involves a " 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933)." Power Reactor Development Co. v. International Union of Electrical Radio and Machine Workers, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961).

After consultations within the Department, Secretary Wilbur on February 24, 1933, advised the Imperial Irrigation District by letter that the acreage limitation of reclamation law did not apply to private lands in the Imperial Valley. This letter stated in pertinent parts as follows:

"Early in the negotiations connected with the All-American Canal contract the question was raised regard-

27. See, e. g., Remarks of Senator King in 70 Cong.Rec. 528; Remarks of Senator Johnson 70 Cong.Rec. 233.

ing whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested rights recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L.D. 351; Ann M. Wright, 40 L.D. 116). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others."

Pursuant to Article 31 of the December 1, 1932 contract, judicial proceedings for the confirmation of the contract were instituted in the California Superior Court for Imperial County, sub nom. Hewes v. All Persons. (Civil No. 15460, unreported, 1933). The United States was not named a party but was kept advised of all steps in those proceedings and furnished with copies of all pleadings and papers filed therein. There was directly raised in the pleadings the question as to whether the 160-acre limitation had application to privately owned lands within the District. At no time did the United States voice opposition to the proposition urged in the litigation that the 160-acre limitation did not apply to landholdings within

the District, either by intervening in said action, appearing therein as amicus curiae or otherwise.

The decision in said cause of Hewes v. All Persons upheld the authorization for and the validity of the December, 1932 contract, as written, i. e., as being a contract which, consistently with the knowledge and intent of the parties thereto, contained no clause or provision having the effect of imposing the 160-acre limitation upon private landholdings within the District. The decision expressly held that the acreage limitation had no application to privately owned lands within the District. At all times during the construction of the All-American Canal and thereafter, the United States was aware of the holdings of the Superior Court. During the years when the All-American Canal was being constructed, no one in the Bureau of Reclamation or Department of the Interior suggested at any time that the acreage limitation was or should be applicable to the Imperial Valley.

In 1941, B. P. King, an attorney in the Bureau of Reclamation was authorized by Commissioner of Reclamation, W. J. Bunks, under instructions of the Secretary of the Interior, Harold L. Ickes, to make a comprehensive study of the excess land law. Pursuant to these directions, a report was filed in the same year entitled "The Excess Land Provision of the Federal Reclamation Law." In the report, Mr. King gave consideration specifically to the All-American Canal. Mr. King concluded that the excess land provisions of federal reclamation law were not applicable to the Imperial Valley.

In 1942, the General Counsel for the Federal Land Banks at Berkeley raised the question as to whether the 160-acre limitation was applicable to privately owned lands within the Imperial Irrigation District, Imperial County, California. The officials of the Federal Land Bank at Berkeley were informed by the Bureau of Reclamation that the limitation did not apply to such lands.

In 1946, the Bureau of Reclamation published its "Landownership Survey on Federal Reclamation Projects." This survey reflected no excess land acreage in the Imperial Valley.

Perhaps the most serious challenge to the administrative policy initiated by the Wilbur letter arose in 1944-1945 in connection with negotiations for a supplemental repayment contract to be entered into between the United States and the Coachella Valley County Water District. Solicitor of the Department Fowler Harper rendered an opinion[28] on May 31, 1945, stating that Section 14 of the Project Act carried into operation the acreage limitation provisions of reclamation law and that acreage limitation should be incorporated in the Coachella contract. He noted that the Wilbur letter was limited to Imperial Valley, but he criticized it on the basis that it disregarded all other excess-land provisions except section 5 of the 1902 Reclamation Act.

Following approval of the opinion by Secretary Ickes, a supplemental contract was executed on December 27, 1947, which imposed acreage limitations in the Coachella Valley. Compliance was voluntary on the part of the Coachella District, and no litigation on the issue ensued. Whether this acceptance was in recognition of the correctness of the ruling or merely reflective of the fact that there were few excess land holdings is unknown.

The Department was left in the seemingly anomalous position of enforcing acreage limitation in Coachella Valley under the Project Act while allowing excess land holdings in the Imperial Valley. It will be recalled that section 1 of the Project Act prohibits charges for the "use, storage or delivery of water * * in the Imperial or Coachella Valleys." This apparently contradictory state of affairs was called to the attention of Secretary Krug in 1948. In a letter to H. C. Hermann of the Veterans of Foreign Wars, commenting on this situation, the Secretary noted that as a technical matter the Harper opinion applied only to Coachella Valley. He further stated:

> "Concerning, however, the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged

28. 71 Decisions of the Department of the Interior 496 Appendix H at p. 533.

with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to reply upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

> *To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be,* to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question." (emphasis supplied)

While the Secretary based his reluctance to press the Imperial matter further on considerations of fairness to those who had long relied on the Wilbur letter, he studiously avoided conceding that an inconsistency existed because Solicitor Harper himself was not informed of the status of water rights in the two districts. In his opinion, Solicitor Harper states:

> "Although the language of the letter of Secretary Willbur seems broad enough to include the Coachella Valley District lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently assumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated."

There was of course ample data then available to show that in Imperial Valley there were in excess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights. There was much discussion of how section 14 of the Project Act made that act a supplement to reclamation law, but no discussion of Congressional recognition of pre-existing rights under the Colorado River Compact found in sections 6, 8 and 13 of the Project Act. As has been noted in the discussion of statutory language, there is no inconsistency between a prohibition on charges for the use, storage and delivery of water and an acreage limitation provision, but there is such an inconsistency between recognizing the pre-existing rights and enforcing acreage limitation. The extent of pre-project development is the heart of the difference between the Imperial and Coachella situations, and this is why Secretary Krug's statement of what he would do if an inconsistency existed at that time does not represent serious and informed criticism of the Wilbur policy. That it was even less a rejection of that policy is evidenced, in part, by the negotiation in 1952 of a supplemental contract with the Imperial Irrigation District which made no mention of acreage limitation.[29] In Article 17 the supplemental contract reaffirmed the contract of December, 1932. Such reaffirmance expressly continued in effect the 1932 covenants with reference to the satisfaction of perfected rights, the controlling effect of the Colorado River compact and the other provisions of the 1932 contract earlier mentioned herein.

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29. Former Solicitor of the Department Edward Weinberg, who participated in these contract negotiations, testified that the Department had considered including an acreage limitation clause in the contract, but that this item was dropped because the Department was then preoccupied with the problem of treaty commitments to Mexico for delivery of water. Also, it was recognized that the District would not have signed a contract incorporating acreage limitation. After considering these factors, the Department was of the opinion that inclusion of acreage limitation for private lands would be "counter-productive."

On February 5, 1958, Solicitor Bennett of the Department of the Interior wrote the Solicitor General of the Department of Justice in connection with the then pending case of Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, and the question posed by Arizona in the oral argument therein as to whether the 160-acre limitation was applicable to the lands of the Imperial Irrigation District. Solicitor Bennett stated:

> "The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, *I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.*
>
> "The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. *There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effect.*" (emphasis supplied)

This history of the administrative practice has necessarily been selective, but a thorough review of Departmental policy has failed to disclose a departure from the interpretation initiated by Secretary Wilbur until 1964. This interpretation was followed during the incumbencies of six successor Secretaries and four Presidential administra-

tions.[30] From time to time during the period 1933-1964, a few individual members of the Department expressed doubt as to the validity of the Wilbur opinion, but these doubts never crystallized into an official repudiation. The Supreme Court commented on a similar situation in United States v. Midwest Oil Co., 236 U.S. 459, 472-473, 35 S.Ct. 309, 313, 59 L.Ed. 673 (1915):

> "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage iself — even when the validity of the practice is the subject of investigation."

VIII. CONGRESSIONAL KNOWLEDGE AND APPROVAL OF THE WILBUR INTERPRETATION

The failure of Congress to revise a statute or take other affirmative action with respect to an administrative interpretation of a statute is often competent evidence that the interpretation is congruent with the legislative design. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933). *Cf.* Red Lion Broadcasting Co., Inc. v. Federal Communication Commission, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965).

Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of

30. Secretary Ickes under Presidents Roosevelt and Truman; Secretaries King and Chapman under President Truman; Secretaries McKay and Seaton under President Eisenhower. During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation.

the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958.

Beginning in 1943, efforts were made in Congress to exempt the Central Valley Project of California from the acreage limitation. These attempts generated a fierce debate over the basic policy of land limitation, which continued for more than three years. In the end, advocates of the 160-acre limitation were successful as regards its application to Central Valley. While the inapplicability of the acreage law to Imperial Valley was repeatedly cited to Congress, the validity of that position went unchallenged. On the contrary, the Bureau of Reclamation never flagged in its support of the Wilbur ruling. Typical is the testimony of Assistant Commissioner Warne before a Subcommittee of the Senate Commerce Committee in connection with the Omnibus Rivers and Harbors bill of 1944:

> "Representative ELLIOTT: Why was the limitation lifted in the Southern part of California down in the Imperial Valley? Why was 160-acre limitation lifted? That applied there, just the same as it did elsewhere.
>
> "MR. WARNE: No, there was never a 160-acre limitation applied to the Imperial Valley.
>
> "Representative ELLIOTT: It came under the same Act, the Act of 1902.
>
> "MR. WARNE: No, I am sorry, I think you will find that the Boulder Canyon Act authorized the All-American Canal, and that the provision did not apply there except as to public lands . . ."[31]

31. Hearings on H.R. 3961, before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., Part IV, page 599 (1944).

In addition to the foregoing, copies of the Bureau of Reclamation's excess land surveys of 1946 and 1964 were filed with Congress.

At no time from 1933 to the present has Congress taken any action in derogation of the propriety of the Wilbur interpretation or of the long standing administrative practice which followed it.

It has been observed that to attribute significance to the inaction of Congress is often a "shaky business."[32] In this case, however, some weight must attach to this knowing inaction. Congress would hardly have ignored the Department's failure to enforce an important provision of reclamation law. *Accord,* United States v. Gerlach Livestock Co., 339 U.S. 725, 735-736, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

The court accordingly holds that the defendant Imperial Irrigation District is not bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to any of the privately owned lands within the boundaries of Imperial Irrigation District.

The court further holds that the land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District.

Counsel for defendants may present an appropriate judgment.

32. Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 408-409, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1960).

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendant.* JOHN M. BRYANT, et al., Landowner defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervening Defendant.* BEN YELLEN, et al., *Applicants for Intervention.*	CIVIL NO. 67-7-T ORDER DENYING APPLICANTS' MOTION TO INTERVENE

This cause came on regularly for hearing before the court on the application of Ben Yellen et al. to intervene of right pursuant to Rule 24(a) (2); the United States of America appearing by Assistant United States Attorney, Raymond Zvetina; Imperial Irrigation District appearing by R. L. Knox, Jr., John M. Bryant, et al. appearing by O'Melveny & Myers, Pierce Works and Charles W. Bender; State of California, intervenor, appearing by Deputy Attorney General Neil Gobar; and Ben Yellen, et al. by Arthur Brunwasser. Applicants for intervention have moved for an order permitting intervention; for leave of court to take the deposition of Mr. David Warner, Chief of Litigation,

Lands and Natural Resources Division, Department of Justice; and for an order staying implementation of the judgment entered on February 9, 1971, until ten days after the ruling on these pending motions. The motion to stay implementation of the judgment is hereby ordered denied because there will be no delay in the issuance of the court's ruling. The motion for leave to take the deposition of Mr. David Warner is denied because there is no showing of the necessity therefor. The United States has no duty to disclose its decision concerning appeal during the sixty-day period within which an appeal may be taken.

The court finds that the application to intervene is timely made. Intervention after judgment is permissible if there is no substantial prejudice to the other parties. This litigation is now in its fourth year, and the limited nature of the participation sought, that of appeal, does not disturb the prior proceedings.

All of the defendants assert that the judgment in the 1933 case of *Hewes v. All Persons* (Civil No. 15460, Superior Court, Imperial County, California) is *res judicata* as to the applicants for intervention. Proceedings in the *Hewes* case were instituted pursuant to Article 31 of the December 11, 1932 contract between the United States and the Imperial Irrigation District and § 511 of Title 43 of the United States Code. The object of the suit was to determine the validity of the 1932 contract. In this action the question of whether the 160-acre limitation had application to privately owned lands within the District was litigated, and it was held there that the acreage limitation did not apply.

It appears that this proceeding *in rem* was intended to and did bind all persons claiming any right, title or interest in property located within the Imperial Irrigation District and that accordingly the intervention is precluded as a collateral attack upon a judgment entitled to full faith and credit.

However, regardless of the effect of the *Hewes* decision, it is incumbent upon the applicants to demonstrate "an interest relating to the property or transaction which is

the subject of the action." Rule 24(a)(2) Federal Rules of Civil Procedure. The interest supporting intervention has been described as a "direct, substantial, legally protectible interest in the proceedings." *Hobson v. Hansen,* 44 F.R.D. 18 (1968) The applicants here assert that they desire to buy excess land which may be sold if the government ultimately prevails in this lawsuit and is able to enforce acreage limitation in the Imperial Irrigation District, but this "interest" is no greater than that possessed by the general public. Several specific factors in this case illustrate how extremely speculative and remote is the interest asserted here. Before any possible sale of excess lands, the initial decision in the first phase of the lawsuit must be reversed on appeal. If this occurs, then there will be a second lengthy trial concerning the nature and extent of the landowner defendants' vested rights to Colorado River Water. If the government prevailed in that phase, a plan for disposition would have to be proposed and executed. In all probability, there would be some recognition of the added value of the land due to efforts of the current land owners. Applicants have shown no present ability to purchase and no prior offers within the past twenty years to purchase farm land in the Imperial Valley at market value. Because this is not a class action intervention, the capability of the named applicants to purchase the lands they desire is material. Furthermore, the requirement of reclamation law for recordable contracts to be approved by the Secretary of the Interior is in no way inconsistent with the customary and usual right of a seller to choose his purchaser. Finally, if the Secretary of the Interior were able to take a more active role in the disposition of excess lands, there would quite likely be a veterans' preference for entry which would put a large class ahead of the present applicants. Cf. 43 U.S.C. §§ 186, 279.

It is also required that the interest of applicants for intervention be inadequately represented by existing parties. The court has observed the vigorous representation by counsel for United States in urging that acreage limitation applies in the Imperial Irrigation District and finds that the interest of applicants, if any, has heretofore and is now being adequately represented by plaintiff.

Accordingly, it is ordered that the motion for leave to intervene be, and the same hereby is, denied.

DATED: March 29, 1971.

/s/ HOWARD S. TURRENTINE
United States District Judge

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF IMPERIAL

IN THE MATTER OF THE VALIDATION OF A CONTRACT, DATED DECEMBER 1, 1932, ENTITLED "CONTRACT FOR CONSTRUCTION OF DIVERSION DAM, MAIN CANAL AND APPURTENANT STRUCTURES, AND FOR DELIVERY OF WATER" BETWEEN THE UNITED STATES OF AMERICA AND IMPERIAL IRRIGATION DISTRICT, THE EXECUTION OF WHICH WAS AUTHORIZED AT AN ELECTION HELD IN SAID DISTRICT ON THE 12TH DAY OF JANUARY, 1933. EVAN T. HEWES (Substituted for JOHN L. DUBOIS), et al., *Plaintiffs,* *vs.* ALL PERSONS, etc., *Defendants.*	No. 15460.
CHARLES MALAN, *Plaintiff,* *vs.* IMPERIAL IRRIGATION DISTRICT, et al., *Defendants.*	No. 15454.

OPINION.

Charles L. Childers and D. B. Roberts, of El Centro, for Imperial Irrigation District.

Stewart, Shaw & Murphey, and Arvin B. Shaw, Jr., of Los Angeles, and W. O. Irving, of Riverside, for Coachella Valley County Water District.

H. W. Conkling, of San Diego, for Charles Malan.

Under date of December 1, 1932, the United States of America, acting through the Secretary of the Interior, entered into a contract with Imperial Irrigation District, whereby the United States agreed to construct a dam across the Colorado River, to be known as the Imperial Dam, and a canal from the said river to Imperial and Coachella Valleys, to be known as the All-American Canal. The contract recites that it is made pursuant to the Act of Congress approved June 17, 1902, (32 Stat. 388), and acts amendatory thereof and supplementary thereto, known as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928, designated as the Boulder Canyon Project Act (45 Stat. 1057). The contract requires that the execution of the same by the district shall be authorized by the qualified electors thereof at an election to be held for that purpose, and that the district shall prosecute proceedings in court for a judicial confirmation of the authorization and validity of the contract, without which authorization by the electors and confirmation by the court the United States shall not be bound. The District is organized under the California Irrigation District Act, approved March 31, 1897 (Stats. 1897, p. 254), and acts amendatory thereof and supplementary thereto. It entered into the contract pursuant to an act approved May 5, 1917. (Stats. 1917, p. 243). The latter act authorizes irrigation districts to contract with the United States under the Federal Reclamation Law, or any other act of Congress, for the construction of irrigation works, and provides that any contract between an irrigation district and the United States shall be submitted to a vote of the electors of the district and may be submitted to the court for a determination of the validity of the contract.

In compliance with the terms of the contract and of the last mentioned statute, an election was held in Imperial Irrigation District at which the voters approved the contract. Thereupon the first above entitled proceeding was commenced, which was designated during the argument and is herein referred to as the Validation Case. The second case is prosecuted by Charles Malan, an owner of real property and an assessment payer in Imperial Irrigation District, who alleges that the contract is void and seeks to enjoin the District from expending any moneys in furtherance of the contract. This case has been known and will be designated as the Malan case. Malan also filed an answer in the Validation Case, raising the same questions as in the complaint in his action. Coachella Valley County Water District, which is organized under the County Water District Act (Stats. 1913, p. 1049), and certain property owners therein filed a demurrer and an answer in the Validation Case. The Imperial Irrigation District demurred and answered in the Malan case. Both demurrers were argued and rulings thereon were reserved. A motion to consolidate the two cases was made and a ruling was likewise reserved. The cases were tried together under a stipulation that all evidence offered in either case should be deemed offered in the other in so far as applicable.

The defendant's assert that the Statute of 1917 is unconstitutional and that the contract is void in many particulars which will be separately considered.

The Validation Case was brought pursuant to Section 3 of the Act of 1917, which authorizes the submission of the contract to the superior court for determination as to its validity, and provides that the same proceedings shall be had as in the judicial determination of the validity of irrigation district bonds. In Section 68 of the Irrigation District Act is found the procedure for such an action.

1. INTEREST OF COACHELLA VALLEY IN VALIDATION PROCEEDINGS.

Counsel for the Imperial Irrigation District claim that Coachella Valley County Water District and the individuals who join in the answer filed by the latter district are not interested parties within the meaning of the statute, and that therefore they should not be permitted to answer or to defend against the validity of the contract.

The Boulder Canyon Project Act, among other things, authorizes the Secretary of the Interior to construct a main canal and appurtenant structures, located entirely within the United States, connecting the Laguna Dam, or other

suitable diversion dam, with the Imperial and Coachella Valleys, and provides that no charge shall be made for water or for the use, storage, or delivery of water for irrigation or for potable purposes in either of the said valleys. The contract provides for the construction of the canal and appurtenant structures to Imperial and Coachella Valleys, contains the consent of the United States that Coachella Valley may become annexed to the Imperial Irrigation District, and provides that if the said valley be not so annexed the canal and other works shall be reduced in size accordingly.

Evidence was introduced supporting the allegations of the answer as to the efforts made over a period of years and the large sums of money expanded by the Coachella Valley County Water District and the owners of property therein in the promotion and advancement of the plan for the construction not only of the All-American Canal, but of the Boulder Canyon Dam, and in obtaining appropriations for surveys, reports, etc. Evidence was given that the present water supply of Coachella Valley was meager and inadequate, that the water level was constantly lowering, that the Colorado River was the only source of a further water supply, and that without this water the land of Coachella Valley would be practically without value. Reports made to and bills introduced in Congress coupled Coachella Valley and Imperial Valley as the beneficiaries of both the Boulder Dam and the All-American Canal. All of these and other matters covered by the evidence show a present vital interest of the Coachella District in the contract and in the question of its validity, in the event that the lands in said district should later become a part of the Imperial Irrigation District.

Ultimately the Coachella District, by failing to become annexed to the Imperial Irrigation District, may cease to be an interested party, but until such time as it, after opportunity is offered, refuses to become a part of the Imperial Irrigation District it is interested to such an extent that the Coachella District, as well as the property owners therein, should be accorded the right to enter its defense and to present its objections to the validity of the contract.

2. MALAN'S CAPACITY TO MAINTAIN HIS ACTION.

It is also asserted by counsel for the Irrigation District that the Malan case is not properly before the court and should be dismissed. Section 3 of the statute of 1917, under which the Validation Case was brought, authorizes the board of directors of the district to submit the contract to the court for determination of its validity, and refers to the Irrigation District Act for procedure. Section 68 of the latter act authorizes a proceeding, such as this Validation Case, to be commenced by the board of directors of the district, and Section 69 provides that if no such proceedings shall have been brought by the board of directors, then any district assessment payer may bring an action to determine the validity of an assessment levied or bonds issued under the Irrigation District Act, — a contract under the 1917 act. An assessment payer's right to maintain an action depends upon the failure of the district so to do. While the Validation Case is pending he has no capacity to sue. The proceeding authorized by law having been commenced and prosecuted by the board of directors of the district, and Malan having filed his answer as a defendant therein, wherein he raises the same questions as are raised by the complaint in his action, his rights as an assessment payer will be fully protected in this court and, as well, upon appeal. The contract, as above stated, requires the District to prosecute to judgment proceedings in court for a judicial confirmation of the validity of the contract, and provides that the United States shall not be bound under the contract unless and until a confirmatory final judgment shall have been rendered. In addition to his prayer that the contract be declared void, Malan asks that the district be restrained from expending any moneys in furtherance of the contract or in endeavoring to have the same ratified. If the contract be valid, he has no case; if void, it will be so declared in the Validation Case. The maintenance of his action would seem to be an idle act and an unnecessary encumbrance of the record. The proper order is to sustain the demurrer to his complaint without leave to amend. This order, of course, will dispose of the notice to consolidate the two actions.

3. IS BOULDER CANYON PROJECT ACT IN EFFECT?

The defendants assert that the Secretary of the Interior was without authority to enter into the contract by reason of the fact that the Boulder Canyon Project Act has never become effective. That law, which constitutes the sole authority of the Secretary of the Interior to construct not only the Boulder Dam (at the time of the trial and until quite recently known as Hoover Dam), but as well the diversion dam and the All-American Canal covered by the contract in question, provided in Section 4(a) that the act should not take effect, that no authority should be exercised thereunder, and that no work should be begun and no moneys expended on or in connection with the works or structures provided for in the act, unless and until (1) the seven states signatory to the Colorado River Compact should have ratified the said compact and the President by public proclamation should have so declared, or (2) if said states failed to ratify the said compact within six months from the date of passage of the act, then until six of the said states, including California, should have ratified the said compact and should have consented to waive the provisions of the first paragraph of Article XI of the compact, (which made the same binding only when approved by each of the seven signatory states), and the President by public proclamation should have so declared, and further until California, by act of its legislature, should have agreed irrevocably and unconditionally with the United States, for the benefit of the other six states, to a limitation of the use by California of water from the Colorado River as set forth in the said section 4(a) of the Boulder Canyon Project Act. The State of Arizona failed to ratify the compact, but the other six states ratified the same and waived the portion of Article XI of the compact above mentioned, and the California legislature passed the water limitation act as required. We are therefore concerned only with condition or clause (2) above mentioned in determining whether the act became effective before the execution of the contract under consideration.

The statute of California waiving the first paragraph of Article XI of the Colorado River Compact was approved by

the Governor on March 4, 1929, (Stats. 1929, p. 37), and the Water Limitation Act required by section 4(a) of the Boulder Canyon Project Act was approved on the same date. (Stats. 1929, p. 38.) On July 25, 1929, President Hoover issued a proclamation declaring (a) that the seven states had not ratified the compact within six months from the date of passage and approval of the Boulder Canyon Project Act; (i) that six states, including California, had ratified the compact and had consented to waive the required portion thereof; (c) that California had met the requirements of section 4(a) of the act necessary to render said act effective on six-state approval of the compact; and (d) "All prescribed conditions having been fulfilled, the said Boulder Canyon Project Act approved December 21, 1928, is hereby declared to be effective this date", (June 25, 1929).

The defendants claim that as neither the Waiver Act nor the Water Limitation Act contained an urgency clause, they did not take effect until August 14, 1929, ninety days after the adjournment of the legislature, (Const., Art. IV, Sec. 1), and that the declaration by the President in paragraph (d) of the proclamation that the Boulder Canyon Project Act was effective on June 25, 1929, was incorrect, premature, false in law, and therefore void. Section 4(a) of the Boulder Canyon Project Act *did* not require, as a condition to its becoming effective, that the President's proclamation declare the effective date of the act or that it contain any of the matter set forth in paragraphs (c) and (d) of the proclamation of June 25, 1929. Paragraphs (a) and (b) contained all that was required to be stated in the proclamation, and therefore paragraphs (c) and (d) may be ignored and disregarded as surplus. Even though the unnecessary declaration in paragraph (d) that the act was effective on June 25, 1929, was incorrect, the error was inconsequential.

Under condition or clause (2) of Section 4 (a) of the Boulder Canyon Project Act, the act became effective upon the occurrence of three events: (1) when six states, including California, ratified the compact and consented to waive the first paragraph of Article XI thereof; (2) when the President by his public proclamation so declared, and (3)

when the State of California, by act of its legislature, adopted the Water Limitation Act or agreement. Six states, including California, ratified the compact and consented to waive the required provisions thereof, the President so declared in the Proclamation, and California, by act of its legislature, adopted the Water Limitation Act. The fact that the proclamation was issued before the expiration of the period of ninety days after adjournment of the legislature did not detract from its validity. The statute had been passed and the President proclaimed that fact. The seventh state, Arizona, not having ratified the compact within six months from the passage of the Boulder Canyon Project Act, the President's proclamation not having been issued until after the expiration of the six months' period, and all of the conditions of the Boulder Canyon Project Act having been fulfilled by six states, including California, the last named act became effective, at the latest, on August 14, 1929, the date on which the Waiver Act and the Water Limitation Act took effect.

While not necessarily conclusive upon the court, it is a fact that the act has been construed as being in effect by governmental agencies. Congress has appropriated several million dollars for the construction of the Boulder Dam, a contract has been awarded therefor, and the dam is now under construction. Until the act became effective no money could be appropriated or expended for any of the works or structures authorized thereby. (Sec. 4(a) Boulder Canyon Project Act.) No question has been raised by anyone as to the validity of the appropriations or of the construction contract. In *Arizona v. California,* 283 U.S. 23, 449, 75 L.Ed. 1154, 1162, although the question was not directly involved, the supreme court referred to the act as having become effective. The acqueduct of the Metropolitan [illegible in original] upon the Boulder Dam for river control, is also under construction, and contracts have been made by the United States with various governmental and private agencies for the sale of power to be generated at the Boulder Dam.

We are of the opinion that the Boulder Canyon Project Act was in effect prior to the execution of the contract in question.

4. CONSTITUTIONALITY OF THE STATUTE OF 1917.

The authority of the Imperial Irrigation District to enter into a contract with the United States is contained in an act of the California legislature (Stats. 1917, p. 243), which will be herein referred to as the 1917 act. By this statute irrigation districts are empowered to cooperate and contract with the United States under the Federal Reclamation Act or any other act of Congress for the purpose of constructing irrigation works. The defendants assert that this act is unconstitutional for the reasons (a) that it is special legislation; (b) that it is discriminatory and not uniform in operation; (c) that legislative powers are delegated to Congress, to the Secretary of the Interior, and to the Secretary of the Interior and the District, acting together.

The Imperial Irrigation District is the first to take advantage of this statute, and the contract involved here is the first to be made pursuant to its provisions. Consequently in this proceeding the validity of the statute is to be considered for the first time.

In examining the constitutional questions raised, it must be borne in mind that, as said by our supreme court, an irrigation district is not a municipal corporation, but is a public corporation for municipal purposes — a state agency authorized by statute and formed for a specific purpose, that of furnishing water. The same purpose could be accomplished without the organization of a district in the manner provided in the Irrigation District Act, and without providing for the election of a board of trustees or directors by the land owners. The legislature might set up a district, delimit its boundaries, appoint a manager, and empower him to perform all of the functions that are performed by the district officers.

Consideration of the constitutionality of the 1917 act must be in the light of the 1914 amendment to Section 13 of Article XX of the Constitution. That section reads as follows, the said amendment consisting of all of the section beginning with and following the word "except": "The legislature shall not delegate to any special commission,

private corporation, company, association, or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state." It has been held that under the said section, as amended, the legislature has plenary power over irrigation districts. (*Barber v. Callaway,* 195 Cal. 1; *Willard v. Glenn Colura Irr. Dist.,* 201 Cal. 726; *Wores v. Imperial Irr. Dist.,* 193 Cal. 609.) And on the other hand it has been held that this section does not empower the legislature to pass such laws as it sees fit in regard to the affairs of irrigation districts untrammeled by the general requirement that loss of a general nature shall have a uniform operation. (*Mordecai v. Board of Supervisors,* 183 Cal. 434.)

(a) *Special Legislation.* It is claimed that the act is unconstitutional for the reason that it is special legislation in violation of subdivision 33, section 25, Article IV of the Constitution, which prohibits the passage of local or special laws "where a general law can be made applicable".

The first query that suggests itself is whether a general law, ample for all purposes of those districts that are able to finance themselves and to procure a sufficient water supply without outside aid, can be made applicable to districts that desire to enter into contracts with the United States for the purposes set forth in the statute, and that may be compelled to do so in order that they may obtain the benefits of Federal aid in projects which are necessary to the advancement or, possibly, to the very existence of the districts, and which they are unable to finance under the general Irrigation District Act, or in any other manner than with Federal assistance.

Upon the financial question, digressing momentarily from a discussion of the legal phases of the case, the report of Senator Johnson to the Senate, made March 20, 1928, which is set forth in the brief of Coachella District herein, stated: "The All-American Canal will carry a portion of the conserved waters to where they can be used for irrigation and domestic purposes. * * * Neither Imperial Irrigation District, the Coachella District, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." Thus the economic reason for the statute permitting irrigation districts to enter into contracts with the United States is at once apparent, and it becomes necessary to consider only whether such districts may constitutionally be given rights and privileges that are not accorded to those which do not need, or at least do not seek, aid from the government.

The particulars in which defendants claim that the 1917 act is special legislation are that under the Irrigation District Act assessments are made according to value of property assessed, water is apportioned according to assessments paid, water is apportioned by the district, and the district has unsupervised control over change of boundaries, both as to inclusion and exclusion of lands; while under the 1917 act assessments are made according to benefits, water is apportioned according to benefits, water is apportioned in accordance with acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, and district boundaries cannot be changed without the written consent of the secretary.

If a district enters into a contract with a private individual or with any state agency, it may do so pursuant to the laws of this state, but if it desires to contract with the United States, then it must do so according to the requirements of the laws of the United States, and subject to the departmental rules and regulations established by authority of such laws. The 1917 act gives power to irrigation districts to do anything required by the Federal laws to the end that they may receive the necessary assistance.

The legislature is authorized to make certain classifications, and if the same are founded upon reason and are not

arbitrary in their nature, the courts will not interfere. An act "applying uniformly to any single class in its entirety, when the classification is founded upon some natural, intrisic, or constitutional distinction, is not special legislation. * * * The legislature is vested, primarily, with the discretion to make the classification and it has been repeatedly held that courts will not disturb a legislative classification unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason." (*In re Sutter Butte By-Pass Assmt.*, 191 Cal. 650, 671, and cases cited.) In *People v. Central Pac. R.R. Co.*, 105 Cal. 576, the court held that the constitution did not require that all laws should have a uniform operation in every part of the state, and that it did not prohibit legislation for different classes of citizens, and said: "a law which operates only upon a class of individuals is none the less a general law, if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law."

The court held, in the case of *Wores v. Imperial Irrigation District, supra,* that the act relating to the government of irrigation districts having an area of more than 500,000 acres was a general law, and was not in violation of subdivision 33, Section 25, Article IV of the Constitution. In the *Wores* case the court, after referring to the case of *Mordecai v. Board of Supervisors, supra,* which held that the exception in section 13 of Article XI of the constitution did not authorize the legislature to violate the provision of the constitution requiring uniformity in the operation of general laws, said that "when this requirement of the constitution is satisfied by finding a sufficient basis of classification in the attempted legislation, the legislature, in all matters touching the regulation and conduct of the affairs of these classes of governmental agencies, has been given an enlarged discretion by the terms of the aforesaid amendments to the constitution".

Additionally, there is the well established rule that "the discretion of the legislature to make these classifications is very wide, and when such classification is attacked in the courts it will be supported by every presumption in its favor". (*In re West,* 75 Cal.App. 591; *In re Cardinal,* 170

Cal. 519, L.R.A. 1915F, B50; *Wores v. Imperial Irrigation District,* 133 Cal. 609, 620; *In re Sutter Butte By-Pass Assessment,* 191 Cal. 650, 671.)

It is not necessary to cite the numerous other cases which may be found holding laws to be general, even though they were applicable only to a certain group. Tested by the rules laid down in the cases cited, the classification made by the 1917 act is not arbitrary, but is reasonable and is supported upon adequate foundation. If the United States provides the funds for the construction of the required works, it may legitimately require conformance to its laws, rules and regulations. The legislature, without violence to the constitution, may classify irrigation districts, and may distinguish as easily those districts contracting with the United States from those which do not do so, as it distinguished those having more than 500,000 acres from those having a less number of acres. The necessity therefor is clear.

(b) *Discrimination and Lack of Uniformity.* The next ground of attack on the 1917 act is that it is discriminatory and not uniform in operation. Section 11 of Article X of the Constitution provides: "All laws of a general nature shall have a uniform operation". The claim is made that because districts making contracts with the United States have powers not given to other districts, the statute is not uniform in its operation and discriminates as to such districts. Practically all that has been said with reference to the subject of special legislation is applicable here and need not be repeated.

To be uniform in operation, a statute need not operate universally, but it must operate uniformly upon all to which or to whom it may apply. It is general if it applies to all of a certain class alike, and operates uniformly upon and applies equally to all persons in the same category. To be general in its scope, a law need not include all classes of persons, but is within the provisions of the constitution if it relates to and operates uniformly upon the whole of any single class validly selected. The classification must be founded upon reason and must not be the product of the exercise of an arbitrary will. (*In re West,* 75 Cal.App. 591,

and cases cited; *Herow v. Riley,* 209 Cal. 507, 518; *Solousky v. Superior Court,* 180 Cal. 404; *Vail v. San Diego County,* 126 Cal. 35).

Does the 1917 act measure up to this rule, and is its classification a natural one? It is conceded that the act is not applicable to all irrigation districts in the state, but need it be so in order to escape censure? It provides a method of assessment, a system of water distribution and other regulations for those districts coming under its terms different from those applicable to other districts. But it is uniform as to all districts that bring themselves under its provisions. It does not alter the scheme of the original Irrigation District Act except as to the districts contracting with the United States, and it is uniform as to the latter. The classification of districts is not unnatural, unreasonable or arbitrary, and the statute operates uniformly upon all districts in the class to which it applies.

Again the case of *Wores v. Imperial Irrigation District, supra,* is authority, wherein the court held that the setting apart of districts having an area of more than 500,000 acres in a class separate and apart from those having a less area was not obnoxious to Section 11 of Article I of the Constitution.

(c) *Declaration of Legislative Powers.* The 1917 act is alleged to be void on the further ground that it delegates the legislative power of the state (1) to Congress, in sections 1, 2, 4, and 6, by authorizing districts to contract with the United States under acts of Congress "hereafter enacted"; (2) to the Secretary of the Interior, in sections 2 and 4, by making every such contract subject to rules and regulations to be established by the Secretary, and in section 8, by authorizing the Secretary to determine whether the district may be dissolved or its boundaries changed; and (3) to the Secretary and the district, acting together, in sections 4, 5, and 7, by making the authority to execute the contract depend upon and be enlarged or modified by the provisions of the contract itself.

It is agreed that the legislature cannot constitutionally delegate its legislative power, though it may refer to some

other officer or board the power to determine whether a certain thing shall be done, after first prescribing a standard by which such officer or board is to be governed in reaching a decision. The question then is whether the legislature did, by the 1917 act, delegate any of its legislative power by providing that a contract might be made under acts of Congress "heretofore or hereafter enacted". The statute merely authorized irrigation districts to contract under any Federal law in force at the date of the contract. It did not adopt or purport to adopt, by reference or otherwise, any act of Congress then in force or subsequently to be enacted. Manifestly a district entering into a contract today with the United States would be compelled to do so under the statutes of the United States now in force, and not under a statute that may have been in force in 1917, and that has since been amended or repealed. If the clause with reference to Federal laws had been omitted entirely and if the statute had merely authorized irrigation districts to enter into contracts with the United States for the purposes stated in the act, the effect would have been the same, — this contract would have been executed under the statutes in force when it was signed, whether the same were in force in 1917, or only recently adopted.

If, when the 1917 act was adopted, there had been no Federal law authorizing the United States or any officer thereof to enter into contracts with irrigation districts, or with any other state agency, such a contract as the one involved here could not have been made for lack of federal authority. It could not be said that the legislature surrendered any of its legislative power merely by reason of the subsequently enacted Federal authority which imposed the conditions found in the reclamation law and in the Boulder Canyon Project Act. If Federal statutes were in force in 1917, or were adopted later, and if the California statute did not refer to the Federal laws, either then in force or thereafter to be adopted, the situation would have been the same.

With power vested in the legislature to form a district and to provide for its government, there seems to be nothing to prevent it from taking from the directors the right and power to change boundaries or to determine the conditions

under which they may be changed. Here it is provided by statute that after a district enters into a contract with the United States, its boundaries may not be changed without the consent of the Secretary of the Interior. An obligation of contract is imposed upon the district for the benefit of the United States.

It may be assumed that the water to be furnished is estimated by the Secretary to be sufficient in amount for the land in the district as existing or as provided for in the contract. As counsel for the districts point out, the United States is guaranteeing the water supply and its security cannot be permitted to be impaired by a change of district boundaries, either by enlarging or diminishing the area. If too much land is added to the district, the water supply will be insufficient for the enlarged district, thus rendering all of the land in the district less productive, or possibly nonproductive. If land is excluded from the district, even though, pursuant to section 84 of the Irrigation District Act, the excluded property would be answerable for and chargeable with the payment and discharge of the outstanding indebtedness, without water it would be less valuable, or perhaps of no value. In either event the contractual obligation of the district would be impaired. This could not be done even if section 8 were not in the statute. For this reason, if for none other, the provision requiring written consent of the secretary to a change in boundaries does not delegate any legislative power to him, but sustained the sanctity of the contract.

It is true, as stated in the argument, that the legislature cannot cede away its power of legislation, and that one legislature cannot pass a law which a succeeding legislature cannot amend or repeal. It does not follow, however, and it is not the law, that when contractual rights have intervened, the legislature, by amending or repealing the statute pursuant to which the contract was executed, may deprive a contracting party of the rights and obligations accruing to it under the contract and under the statute pursuant to which the same was executed.

The situation in the case of *Bottoms v. Madera Irrigation District,* 74 Cal.App. 681, relied on by defendants, was quite

different from that in the instant case. There the district entered into a contract to dissolve and to transfer its assets to a district which was to be set up in a manner not provided for by law. The court held it had no power to do so. Here we are construing a statute which the legislature had power to adopt, not a contract which was unauthorized by law. Besides, in the *Bottoms* case the Madera district was attempting by its own contract to destroy itself, while the statute here does not authorize the destruction of a district, but preserves the contracting district unimpaired and the area unchanged as security for the performance of its contract.

A district cannot impair the obligation of its contract and the legislature cannot authorize it to do so. The laws in force at the date of a contract are a part of the contract to the same extent as if they were written into the same at length. (*Bronson v. Kinzie,* 42 U.S. (1 How.) 311, 11 L.Ed. 143.)

The legislature, under its power over irrigation districts, may establish or change the boundaries or may delegate power so to do. The Irrigation District Act provides for the change of boundaries by the board of directors, but this power may be taken from them by legislature and the legislature may even prohibit entirely the change of boundaries. By the 1917 act the legislature did not do any of these things, but provided that the boundaries should not be changed without the written consent of the other contracting party, the United States.

This statute is not a delegation of legislative power, and does not authorize any person or board to legislate. It authorizes the execution of contracts for particular purposes. It is within the power of the legislature to declare and it did declare the conditions under which such contracts might be executed, and it set forth some of the provisions that might be placed therein. It is entirely a matter of contract and not of legislation.

5. VALIDITY OF CONTRACT.

Defendants oppose the validation proceedings, not only upon the several grounds hereinbefore examined, but upon

the alleged invalidity of certain portions of the contract. Some of the objections to the contract are dependent upon the constitutionality of the 1917 act and are disposed of with the discussion of that statute.

(a) *Ballot and Notice of Election.* Section 3 of the 1917 act requires that any proposal to enter into a contract with the United States thereunder shall be voted upon at an election to be held in the district. It is required that the notice of election contain "a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property, if any, to be conveyed by the district" to the United States, and that the ballots at such election shall contain "a brief statement of the general purpose of said contract and the amount of the obligation to be assumed, as aforesaid". The statement appearing in the notice and on the ballot, after setting forth the general purposes of the proposed contract, was that "the amount of the obligation to be assumed by the district for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, shall not exceed $38,500,000 together with $768,000 still unpaid" on a prior contract with the United States.

The defendents claim that the notice and the ballot did not meet the foregoing requirement, because, according to the allegations of the defendants, when the diversion dam is constructed, the water level of the Colorado River northerly therefrom will be raised to such an extent that damage will be caused to land in Palo Verde Irrigation District, in California, and in Cibola Valley, in Arizona, both by causing overflows and by raising the water table under the valleys to such extent that the productiveness of the soil will be destroyed, and that the notice of election and the ballot were void for the reason that neither contained any reference to such possible damages or to the liability of the district therefor. Article 7 of the contract requires the district "to repay to the United States expenditures incurred on account of any and all damages due to the existence, operation or maintenance of the diversion

dam and main canal, the incurrence of which increases expenditures by the United States beyond" the contract price of $38,500,000.

Section 3 of the 1917 act requires the notice of election to contain a statement of the maximum amount payable to the United States "for construction purposes, cost of water supply and acquisition of property" and that the ballot shall contain a brief statement of "the amount of the obligation to be assumed, *as aforesaid*". The notice is not required to set forth any amount except that which is agreed to be paid for construction purposes, cost of water supply and acquisition of property. It is not required to refer in any manner to the damages which the United States may incur and which the district may be required to repay. The notice was in strict literal accord with the statute, as was the ballot, the latter containing a statement of the amount of the obligation to be assumed, "as aforesaid", which refers to nothing other than the statement required to be set forth in the notice.

Evidence was introduced on behalf of both parties upon the question of damages to land in the Palo Verde and Cibola valleys. It was conflicting. The defendants' witnesses, all of them interested, testified as to the possibility of damages by reason of raising the water level in the river to such an extent that it would overflow and would also raise the water table under the lands in the said valleys, causing the same to be waterlogged, and plaintiff's witnesses, also interested, were quite as positive that no damage could possibly result to the said valleys. The Gault report referred to the possibility of damages to said valleys, but no definite finding was made. In view of the conflict and of the failure of either side to produce a fair preponderance of the evidence, the court will find that no such damage will result.

Assuming, however that the court could find that damage to the said valleys would result or that there was a possibility thereof, it was not necessary that reference be made thereto in the notice of election or upon the ballot, and such reference, even if made, would be of no practical value to

the voters in indicating the amount of liability they might be assuming, owing to the impossibility of estimating the amount of such damage, if any, even in the remotest degree. As to this question, the finding will be that the notice of election and the ballot were in accord with the statute. The evidence upon this question was properly received and the notion to strike should be denied.

(b) *Use of Water not Limited by Reclamation Law.* Defendant Malan, the owner of 210 acres of land in Imperial Irrigation District, asserts that the contract is void because section 5 of the Reclamation Law provides that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, thus preventing him from obtaining water for all of his land, that he will be required to pay water assessments upon all of his land but will be able to get water for only 160 acres, and that the contract takes from him, without compensation, his water right for all of his land in excess of 160 acres.

The water right of neither the defendant Melan nor of any other person in the Imperial Irrigation District may be taken by the district or by the government without compensation. Furthermore, section 5 of the Reclamation Law does not apply in these proceedings. The Boulder Canyon Project Act provides a complete scheme for the construction of the Boulder Dam, the All-American Canal, and the dam diverting water from the Colorado River into the canal. Section 1 of the Boulder Canyon Project Act provides that the expenditures for the main canal and appurtenant structures shall be "reimbursible, as provided in the Reclamation Law", and in section 4(b) it is required that before any money is appropriated for the construction of the main canal and appurtenant structures, the secretary shall make provision for revenues adequate in his judgment to secure payment of all expenses of construction, operation, and maintenance "in the manner provided in the Reclamation Law". Section 14 provides that the Boulder Canyon Project Act "shall be deemed a supplement to the Reclamation Law, which said Reclamation Law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided". The act

does not adopt the Reclamation Law or any of its provisions, except as above stated, and the authority of the secretary with reference to the delivery of water must be found in the Boulder Canyon Project Act and not in the Reclamation Law. Section 5 of the Boulder Canyon Project Act authorizes the secretary to contract for the delivery of water "under such general regulations as he may prescribe" and provides that "contracts respecting water for irrigation and domestic uses shall be for permanent service". Article 30 of the contract reads as follows: "Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation and maintenance of the works to be constructed hereunder". There is nothing in the statute or in the contract limiting the acreage to which water may be sold and delivered.

(c) *Opening Public Lands to Entry.* Counsel for defendants assail that portion of Article 23 of the contract which provides that within a reasonable time, to be determined by the secretary, from the date water is available for public lands within the district, such lands shall be opened to entry. Counsel assert that the secretary is without power to make such an agreement for the reason that the disposition of public lands is within the power of Congress. That Congress has the power to dispose of public lands and to make needful rules and regulations therefor is not disputed, and without authority of Congress the secretary would have no power to agree as to the opening of public lands to entry or other disposition thereof. Congress exercised its power over the public lands in the district and gave the necessary authority to the secretary in Section 9 of the Boulder Canyon Project Act, wherein it is enacted that all public lands found by the secretary to be practicable of irrigation and reclamation by the irrigation works authorized by the act shall be withdrawn from public entry, and that thereafter, at the discretion of the secretary, such lands shall be opened for entry in accordance with the provisions of the reclamation law.

Congress having exercised its authority to provide for the disposal of public lands as provided in said section 9, and having by the same statute authorized the execution of the contract now under consideration, and the Secretary,

pursuant to such authority, having agreed with the district, as a part of the consideration for the contract, that he will open the lands for entry when water is available therefor, the contract has become a binding obligation upon the United States.

(d) *Secretary's Veto of Change of Boundaries.* Article 11 of the contract provides that after the date of the contract no change shall be made in the boundaries of the district unless and until the secretary shall assent to such change in writing. It is claimed by the defendants that the foregoing provision renders the contract void because it takes from the district and the board of directors thereof a power which is theirs exclusively under the Irrigation District Act and reserves to the secretary the right to determine whether territory now in the district shall be excluded therefrom and whether new territory shall be included therein.

This provision of the contract is in accord with section 3 of the 1917 act, which has been fully covered in the discussion of the claimed delegation of legislative powers and need not be repeated here. If the statute is constitutional, the contract is valid. Having determined the former, the latter must necessarily follow.

(e) *Power Possibilities Reserved.* By a contract between the United States and Imperial Irrigation District dated October 23, 1918, for the consideration therein named, the District was given certain rights to divert water from the Colorado River at Laguna Dam, which dam was recited in the contract to have been constructed by the United States in connection with the Yuma project, including land in both Arizona and California. Development and disposition of power is covered by the said contract.

Article 14 of the contract under consideration in the present proceeding provides that as one of the considerations for the partial termination of the contract of October 23, 1918, as provided for in Article 16 of the contract, the power possibilities on the All-American Canal, down to and including Syphon Drop, with water carried for the benefit of the Yuma project, are reserved to the United States.

Other power possibilities upon the canal are given to the district subject to the participation by other agencies as provided for in another portion of the contract which provides for increasing the capacity of the works for other agencies without additional cost to the district. This provision is not in violation of the Boulder Canyon Project Act. By Section 7 thereof the districts or other agencies contributing to the cost of the canal and other works are given the privilege of utilizing, by contract or otherwise, the power possibilities in proportion to their respective contributions or obligations toward the capital cost. By this provision of the contract the district is now agreeing to the use of a portion of the power that may be developed upon the canal, but only as to that portion of the power that may be generated with the water carried for the benefit of the Yuma project. The power generated by the district's portion of the water is not affected by the contract.

As to the participation by other agencies in the power, we think the contract is quite clear that each agency will have the benefit of the power generated by the water belonging to such agency. Article 21 of the contract reserves the right to the United States to increase the capacity of the works and to contract for such increased capacity with other agencies for the delivery of water for use in the United States, but it is expressly declared that such other agencies shall not thereby be entitled to participate in power development on the canal except at points where and to the extent that the water diverted and carried for such agencies contributes to the development of power. The contract plainly provides for a division of the power generated by water flowing through the canal in the proportion that the right to use the water is acquired by such agencies.

(f) *Works for the Benefit of the Yuma Project.* Article 15 of the contract sets forth that as a further consideration for the partial termination of the said contract of October 23, 1918, as provided in Article 16, the district agrees to divert at the Imperial Dam and to transport and deliver at certain points on the canal, the available water to which the Yuma project is entitled, not exceeding 2,000 second-

feet, for the use and benefit of said Yuma project; such diversion, transportation and delivery to be without expense to the United States as to capital investment required to provide facilities for such diversion and transportation.

It is claimed that this provision is without consideration and renders the contract void because, a portion of the Yuma project being in the State of Arizona, this requirement will entail an expense to the district for the benefit of lands outside of the State of California, and there is no provision in law authorizing the levying of assessments upon land in California irrigation districts for the benefit of lands in another state.

Not only is a good and sufficient consideration for a written contract presumed (C.C.P. 1963, subd. 39), but the same is expressed in the contract as above stated, and in Article 16 of the contract provision is made for partially terminating the said contract of October 23, 1918.

Section 1 of the 1917 act authorizes irrigation districts to cooperate with the United States, under any act of Congress permitting such cooperation, for the acquisition, operation or maintenance of constructed works or for a water supply, and Section 15 of the Irrigation District Act authorizes the board of directors of an irrigation district to do any acts necessary or proper for the performance of agreements with the United States for the joint acquisition, etc., of any rights, works, or other property which may be lawfully acquired or owned by an irrigation district. Both the authority and the consideration are sufficient to sustain this portion of the contract.

(g) *Not Required to Build Canal to Coachella Valley.* Section 1 of the Boulder Canyon Project Act authorizes the Secretary of the Interior to construct a main canal connecting the diversion dam with Imperial and Coachella Valleys, but his power is restricted by Section 4(b) which provides that before any construction work is done upon the canal or contracted for, the secretary shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all charges for construction, operation and maintenance of the canal. The statute au-

thorizes, but does not require, the building of the canal to both Imperial and Coachella Valleys, or to either one of them, and the authority given is conditioned upon a contract which will insure payment to the United States of its entire expenditure. If one valley, no matter which, executes a contract sufficient in the judgment of the secretary to insure payment of the cost of construction, the secretary is authorized to construct the canal to that valley without the concurrence of the other. It was never intended that the refusal of one valley to enter into a contract would prevent the other from so doing. There is nothing in the Boulder Canyon Project Act preventing the secretary from entering into a separate contract with the duly constituted authorities of each valley.

Strange, indeed, would it be to construe the statute as meaning that a contract executed by the secretary pursuant to this statute must be one that is satisfactory to both valleys, and that if they failed to agree upon all terms and conditions neither one could have the benefit of the canal. Here the contract is satisfactory to Imperial Valley, as indicated by these proceedings which are brought by the Imperial Irrigation District to have the same validated by this court, and by the approval of the contract by an overwhelming vote of the electors of the district. The fact that Coachella Valley and the owners of property therein are not content with the contracts as certainly evidenced by the effort of the Coachella Valley County Water District and its codefendants to prevent such validation. The situation could be as easily reversed. A contract with which Coachella Valley was content might be before the court with as forcible opposition from Imperial Valley. In either event, if this were a joint or cooperative enterprise requiring approval of the contract by both valleys, an impasse might exist which would forever preclude the construction of a canal to either valley.

We have already discussed the inapplicability of the Reclamation Law to this proceeding except as the same is made so by the express terms of the Boulder Canyon Project Act. The statute does not require a unit construction. Neither the statute nor this contract deprives Coachella Valley, or any of the property owners therein, of any right

to the construction of a canal into that valley under such terms as may be arranged with the United States, or of any right that now exists or that may hereafter be acquired to the waters of the Colorado River, or to the use thereof.

(h) *Collection of Assessments by Coachella District.* Defendants claim that the contract is void in that it provides in Article 10(e) that if the lands now or hereafter within Coachella Valley County Water District are included within the Imperial Irrigation District, Coachella District shall have the privilege, at its option, of paying to the Imperial District the amount of annual and special assessments levied by the Imperial District upon the lands in the Coachella District, asserting that this is in violation of the irrigation district law which requires the collection of assessments by the district collector. Article 10(e) of the contract provides that the Coachella District shall have the privilege of making such payments "if, as and when authorized to do so by law". If the Coachella District is not now authorized by law to collect assessments and pay the same to the Imperial District, the contract does not authorize it to do so and it will not have such power until the law is amended so as to permit such action on its part. This provision of the contract, by its own terms, is not effective unless now authorized by law or unless authority shall hereafter be conferred by law.

(i) *Plans and Specifications.* It is claimed that the contract is void because it does not refer to any plans or specifications pursuant to which the work is to be constructed. Article 7 of the contract provides that the United States will construct the dam and the All-American Canal and appurtenant structures at the approximate locations shown upon a map which is made a part of the contract. The canal is to be of a capacity specified in the contract to a certain point, and other portions of the canal are to be of such capacity as the secretary may determine "to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by this contract", and the secretary is further given power to change capacities, locations, lengths, and alignments during the progress of the work when in his opinion the same may be expedient, economical, necessary or advisable. The ultimate cost to

the district of the entire works to be constructed is limited to $38,500,000.

This is not a construction contract wherein detailed plans and specifications are required. The contract requires the construction of a main canal sufficiently large to carry the required amount of water for the irrigation of the lands to be served thereby. In view of the fact that the district may or may not be enlarged, depending upon the desire of the owners of property which is not now within the district, it was obviously necessary that the secretary be given discretion to make changes as to capacity, location, etc., of the canal.

(j) *Capital Cost.* Another defect claimed by defendants is that no estimate of the capital cost of the dam, canal and other works has been made, which counsel claim is in violation of the requirement of Section 4 of the Reclamation Law that when the secretary determines that an irrigation project is practicable he may cause contracts to be let for the construction of the same and that thereupon he shall give public notice of the charges which shall be made per acre upon the lands which may be irrigated by the waters of the irrigation project. This is not an "irrigation project" and the said provision of the Reclamation Law has no application to the present proceeding. We have heretofore referred to this question. Neither the 1917 act nor the Boulder Canyon Project Act requires an estimate of the capital cost to be given in any manner different from that which appears in the contract itself as a limitation of the maximum amount to be paid by the district.

(k) *Claims of the United States.* Article 35 of the contract reads: "Claims of the United States arising out of this contract shall have priority over all others, secured and unsecured". This comports with Section 17 of the Boulder Canyon Project Act. The statute and the contract can mean nothing more than that claims of the United States are paramount to private claims, and there is no attempt to create a lien upon the land in the district or to give the United States priority over tax and assessment liens or bondholders' claims. Neither the United States by statute, nor the United States and the District by contract,

may set aside or interfere with the taxing power of the state. The court will not construe the statute to mean that Congress attempted thereby to do something which it had no power to do unless such meaning is unmistakable. But nor will the court presume that Congress knew the limitation of its authority and did not intend by the statute to accord to the United States any greater right than could lawfully be bestowed.

(l) *Units and Benefits.* Section 7 of the 1917 act provides that assessments required to meet the payment due to the United States for all purposes under the contract may be apportioned in accordance with the benefits. The constitutionality of this provision has already been determined.

The act further provides that in the ascertainment of such benefits there shall be taken into account, among other things, the provisions of the contract between the United States and the district. The contract here provides that the district shall be divided into units by the board of directors of the district and that the lands within each unit will be benefited by the works to be constructed under the contract in the proportion that the area within such unit bears to the total area of the district. These provisions of the contract are to be taken into account in the ascertainment of the benefits, along with the other parts thereof. Construing articles 10 and 34 of the contract together, every right that the property owners previously have had under the law is preserved to them. They are not deprived of anything either by the statute or by the contract. The contract has been approved by the presently constituted district at the election held for that purpose. All private lands that are hereafter annexed to the district must come in by petition, after notice and hearing, and the conditions of annexation, including benefits, are determined after a bearing. If the people are not satisfied with the conditions named, they need not become a part of the district. Section 34(b) of the contract is explicit in preserving all rights and remedies of property owners. As to public land in the territory that may be annexed to the district, the Secretary of the Interior has consented to its annexation and to its assessment upon the conditions and in the manner set forth in the contract.

(m) Other minor objections are made to parts of the contract, none of which affect the validity thereof or warrant an extended discussion.

6. ORDERS TO BE ENTERED.

In accord with the conclusions reached, the following orders will be entered:

(a) *In the Validation Case:* The demurrer of Coachella Valley County Water District to the complaint is overruled; the motion to consolidate with the Malan case is denied; the several motions of plaintiffs to strike out evidence are denied; findings and judgment will be entered that the contract and all proceedings leading up to the execution of the same are valid in all particulars.

(b) *In the Malan Case:* The plaintiff's motion for a temporary injunction is denied; the defendants' demurrer to the complaint is sustained without leave to amend; judgment will be entered in favor of the defendants without prejudice, however, to any defense that plaintiff Malan has made or that he may hereafter make as a defendant in the Validation Case; the motion to consolidate with the Validation Case is denied.

Dated May 24, 1933.

/s/ EMMETT H. WILSON
Judge.

APPENDIX F: Extracts of Applicable Statutes

Appendix F-1: Boulder Canyon Project Act, 45 Stat. 1057.

[SEC. 1.[1]] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete

1. Codified as 43 U.S.C. § 617.

plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes.

SEC. 2.[2] (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

2. Codified as 43 U.S.C. § 617a.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amounts so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

SEC. 3.[3] There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

SEC. 4.[4] (a). This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

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3. Codified as 43 U.S.C. § 617b.

4. Codified as 43 U.S.C. § 617c.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its

tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses

of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

SEC. 5.5 That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the

5. Codified as 43 U.S.C. § 617d, with amendment not material here.

sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy

expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other

agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

SEC. 6.[6] That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to

6. Codified as 43 U.S.C. § 617e, with amendment not material here.

comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

SEC. 7.[7] That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

7. Codified as 43 U.S.C. § 617f.

SEC. 8.[8] The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided,* That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

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8. Codified as 43 U.S.C. § 617g.

SEC. 9.[9] That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction costs of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided,* That all persons who have served in the United States Army, Navy, or Marine Corps during the war with Germany, the war with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Navy Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4, Act of December 5, 1924 (Forty-third Statutes at Large, page 702); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this Act: *Provided further,* That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.

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9. Codified as 43 U.S.C. § 617h, with amendment not material here.

SEC. 10.[10] That nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

SEC. 11.[11] That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

SEC. 12.[12] "Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the con-

10. Codified as 43 U.S.C. § 617i.

11. Codified as 43 U.S.C. § 617j.

12. Codified as 43 U.S.C. § 617k, with amendment not material here.

struction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

SEC. 13.[13] (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed

13. Codified as U.S.C. § 617*l*, with amendment not material here.

or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

SEC. 14.[14] This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

SEC. 15.[15] The Secretary of the Interior is authorized and directed to make investigation and public reports of

14. Codified as 43 U.S.C. § 617m.

15. Codified as 43 U.S.C. § 617n.

the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

SEC. 16.[16] In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

SEC. 17.[17] Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

SEC. 18.[18] Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

16. Codified as 43 U.S.C. § 617o.

17. Codified as 43 U.S.C. § 617p.

18. Codified as 43 U.S.C. § 617q.

SEC. 19.[19] That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

SEC. 20.[20] Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

SEC. 21.[21] That the short title of this Act shall be "Boulder Canyon Project Act."

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19. Codified as 43 U.S.C. § 617r.

20. Codified as 43 U.S.C. § 617s.

21. Codified as 43 U.S.C. § 617t.

Appendix F-2: Extracts from Reclamation Act of 1902, 32 Stat. 388.

An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

[SEC. 1.[22]] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided,* That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an

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22. Codified in relevant part in 43 U.S.C. § 391, with amendment not material here.

Act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 3.[23] That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purpose of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this Act.

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23. Codified as 43 U.S.C. §§ 416, 432, and a portion of 434.

SEC. 4.[24] That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands, in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5.[25] That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until

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24. Codified as 43 U.S.C. §§ 419 (with amendment not material here) and 461.

25. Codified in relevant part as 43 U.S.C. §§ 431, 439.

all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act.

SEC. 8.[26] That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

SEC. 10.[27] That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

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26. Codified as 43 U.S.C. §§ 372, 383.

27. Codified as 43 U.S.C. § 373.

Appendix F-3: Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649.[28]

SEC. 46. No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the

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28. Codified as 43 U.S.C. § 423e, with amendment not material here.

construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further,* That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment.

Appendix F-4: Reclamation Extension Act of 1914, 38 Stat. 689.[29]

SEC. 12. That before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the project if adopted for construction.

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29. Codified as 43 U.S.C. § 418.

Appendix F-5: Colorado River Compact,
Signed at Santa Fe, N. Mex., November 24, 1922

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the act of the Congress of the United States of America approved August 19, 1921 (42 Stat. L., p. 171), and the acts of the legislatures of the said States, have through their governors appointed as their commissioners: W. S. Norviel for the State of Arizona, W. F. McClure for the State of California, Delph E. Carpenter for the State of Colorado, J. G. Scrugham for the State of Nevada, Stephen B. Davis, jr., for the State of New Mexico, R. E. Caldwell for the State of Utah, Frank C. Emerson for the State of Wyoming, who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies, and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends, the Colorado River Basin is divided into two basins, and an apportionment of the use of part of the water of the Colorado River system is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II

As used in this compact:

(a) The term "Colorado River system" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River system and all other territory within the United States of America to which the waters of the Colorado River system shall be beneficially applied.

(c) The term "States of the upper division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the lower division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River 1 mile below the mouth of the Paria River.

(f) The term "upper basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River system above Lee Ferry and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system above Lee Ferry.

(g) The term "lower basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which

shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depicted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the 1st day of October next succeeding the ratification of this compact.

(e) The States of the upper division shall not withhold water, and the States of the lower division shall not require the delivery of water which can not reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October 1, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their governors, may give joint notice of such

desire to the governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the upper basin and lower basin the beneficial use of the unapportioned water of the Colorado River system as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV

Priority: (a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey, shall cooperate, ex officio —

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lees Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) With respect to the waters of the Colorado River system not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State, the governors of the States affected, upon the request of one of them, shall forthwith appoint commissioners with power to consider and adjust such claim or controversy, subject to ratification by the legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII

Perfected rights. — Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the lower basin, then claims of such rights, if any, by appropriators or users of water in the lower basin against appropriators or users of water in the upper basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River system shall be satisfied solely from the water apportioned to that basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the legislatures shall be given by the governor of each signatory State to the governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the governors of the signatory States of approval by the Congress of the United States.

In witness whereof the commissioners have signed this compact in a single original, which shall be deposited in

the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the governor of each of the signatory States.

Done at the city of Santa Fe, N. Mex., this 24th day of November, A. D. 1922.

W. S. NORVIEL.
W. F. MCCLURE.
DELPH E. CARPENTER.
J. G. SCRUGHAM.
STEPHEN B. DAVIS, JR.
R. E. CALDWELL.
FRANK C. EMERSON.

Approved.

HERBERT HOOVER.

Appendix F-6: Extract from California Irrigation District Act of 1917, 1917 Cal. Stat. 243, 245.

SEC. 3. Any proposal to enter into a contract with the United States for the repayment of construction moneys, the cost of a water supply or the acquisition of property, and to issue bonds, if any be proposed, shall be voted upon at an election wherein proceedings shall be had in so far as applicable in the manner provided in the case of the ordinary issuance of district bonds. Said proposal, with such plans and estimates of cost as have been made in connection therewith, shall be submitted to the state engineer for his examination and report, and the proceedings in that regard shall be in accord with section thirty of the act approved March 31, 1897, as amended, in so far as the same may be applicable. Notice of the election herein provided for shall contain in addition to the information required in the case of ordinary bond election a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property, if any, to be conveyed by the district as hereinabove provided. The ballots at such election shall contain a brief statement of the general purpose of said contract and the amount of the obligation to be assumed, as aforesaid, with the words "Contract — Yes" and "Contract — No," or "Contract and bonds — Yes" and "Contracts and Bonds — No," as the case may be. The board of directors may submit any such contract or proposed contract and bond issue if any, to the superior court of the county wherein is located the office of said board to determine the validity thereof and the authority of the board to enter into such contract, and the authority for and validity of the issuance and deposit or transfer of said bonds; whereupon the same proceedings shall be had as in the ordinary case of the judicial determination of the validity of bonds and with like effect.

Appendix F-7: Extract from California Irrigation District Act of 1897, 1897 Cal. Stat. 254, 276.

SEC. 68. The board of directors may, at any time after the issue of any bonds or the levy of any assessment herein provided for, bring an action in the Superior Court of the county wherein is located the office of such board, to determine the validity of any such bonds or such levy of assessments; such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of summons for at least once a week for three weeks in some paper of general circulation published in the county where the action is pending, such paper to be designated by the court having jurisdiction of the proceedings. Jurisdiction shall be complete within ten days after the full publication of such summons in the manner herein provided. Any one interested may at any time before the expiration of said ten days appear and by proper proceedings contest the validity of such bonds or assessments. Such action shall be speedily tried and judgment rendered declaring such matter so contested either valid or invalid. Either party may have the right to appeal to the Supreme Court at any time within thirty days after the rendition of such judgment, which appeal must be heard and determined within three months from the time of taking such appeal.

Appendix F-8: 28 U.S.C. § 1738.

1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.